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ABSTRACT

Presentations at the June 9-10, 1976, meeting of the National Commission on New Technological Uses of Copyrighted Works (CONTU) concentrated on computer software protection. There were a panel discussion, a briefing from a General Services Administration spokesman, and a presentation by representatives of the educational community. The testimony and discussions covered definitions of computer software, copyrightability, advantages and disadvantages of copyrights, costs to users, present practices in software protection, taxation, computer abuse of proprietary rights, detection of theft, security of computer systems, federal government software programs, educational exemptions to copyright, compulsory licensing, and the point at which raw data become copyrightable. There was also testimony on information policy and the right to privacy, and there were two discussions about photocopying--one on the formation of guidelines for federal legislation and one on staff planning for research studies. (LS)

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Seventh Meeting

Room 910
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Date: June 9 - 10, 1976

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NATIONAL COMMISSION ON NEW TECHNOLOGICAL USES
OF COPYRIGHTED WORKS

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(CONTU)

Seventh Meeting
June 9, 1976

June 10, 1976

Room 910
CONTU Conference Room
1921 Jefferson Davis Highway
Arlington, Virginia

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BEFORE:

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Retired Chief Judge,
New York Court of Appeals
Special Counsel, Kaye, Scholer, Fierman,
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MELVILLE B. NIMMER -- Vice Chairman
Professor of Law
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JUDGE FULD: I call this meeting to order.

Gentlemen, I welcome you to this meeting. We are going to start the day with a discussion on Photocopying Guidelines.

Mr. Levine will open up the subject.

DISCUSSION ON PHOTOCOPYING GUIDELINES
By
ARTHUR J. LEVINE
EXECUTIVE DIRECTOR

MR. LEVINE: Just reviewing: The Commission, in its April 1 and 2 meeting, offered to assist Congress in aiding the parties in developing wide guidelines on Library Photocopying.

The House Subcommittee accepted the offer of CONTU and, on April 21, Commission Staff sent out a letter to approximately 20 individuals and associations, requesting responses concerning guidelines for implementation of the revised Section 108, as revised by the House Subcommittee on April 7.

We have now received a majority of the responses. There are still one or two that are to come in. The Commission is now to decide how to proceed with those responses.

In addition, Senator McClellan -- Chairman of the Senate Subcommittee on Patents, Trade Marks and Copyrights -- wrote Judge Fuld on May 27, asking that the Senate Subcommittee be kept informed on the progress in

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drafting guidelines, and that CONTU, in addition to assisting the parties in drafting guidelines, also take appropriate initiatives in coordinating the establishment of necessary clearance and licensing mechanisms concerning Library photocopying practices not authorized by S-22--particularly as it came out of the Senate and as it will, perhaps, come out of the House. That is; for Libraries; and not-for-profit-institutions; and for-profit institutions.

Several of the Commissioners and Staff met informally last evening and, with the Commissioners' permission, I will just summarize what the consensus of that meeting was, as to how we proceed from here.

It was suggested that the appropriate tack to take now would be to get the parties together informally--not to come up with firm language for guidelines but, rather, to discuss generally what should be in the guidelines and approaches to guidelines.

It was suggested that this be done by bringing the parties together for a two-day conference away from the noises of the big cities, and from telephones, in an isolated setting, and see whether that kind of an informal situation might produce ideas which the Commission staff would then reduce to writing and use as a basis for proceeding further.

That is pretty much it.

That reflects the viewpoint, pretty much, at this time.

MR. SARBIN: The image that flashed through my mind was "Ten Little Indians"!

(Laughter)

MR. LEVINE: That is interesting. I said the same thing last night!

MR. DIX: We also started a pool on who would be the last Indian left.

MR. SARBIN: Anyhow, I hesitate to comment on it, only because I was not a participant in last night's discussion.

VICE-CHAIRMAN NIMMER: You are here now!

MR. SARBIN: I am not sure what kind of environment would produce a meaningful discussion. Certainly, an informal gathering seems worthwhile.

After thinking about "Ten Little Indians", the second thought I had was that the only way to accomplish anything in an informal weekend of that nature was to think of it as an "encounter session" and have a facilitator there, in order to try to get people there --

VICE-CHAIRMAN NIMMER: That was also suggested.

MR. SARBIN: I merely want to say that I would worry about a weekend like that not really being productive.

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When you create pressures on people by taking them away from their families and other things, with the hope that something will come out of it, and they are frustrated in that effort, I think sometimes that seems to produce greater tension and they cannot escape, because they have agreed to be there.

MR. LACY: I think one of the thoughts that had been had -- and I think we are all conscious of that, Hershel -- was that no effort would be made to reach an agreement at that weekend and that everybody would be told, "Nothing is going to be presented to you that you have to say 'Yes' or 'No' to. There will be no negotiation, actually. We simply want to explore. We want to understand more clearly what your feeling is about this, about that, and about the other."

I think that removes a little bit of that.

MR. SARBIN: Probably. I just want to express my worry. That is all.

MR. HERSEY: I think, beyond that, virtually, the notion was that the new language of 108(g)(2) was a situation that looked promising for a possible agreement on guidelines, and that this might -- since all of the parties have now submitted their suggestions about this -- give a chance for them to exchange ideas about these suggestion and move it one step further along.

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MR. LACY: I am told there would be substantial representation of the Commission, there, to do more than to facilitate -- to, in effect, keep everybody on their good behavior!

MR. SARBIN: Okay.

MR. PERLE: I am sorry that I have been late. I have slept on this --

MR. SARBIN: Overslept?

MR. PERLE: No. I did not oversleep. I felt last night, as I left, that there was a lot of merit. It came to me in my dreams, like Abu-Ben- Adam that this could very well be more counter-productive than productive.

We have the expression in writing of the views of the interested parties. The interested parties can supplement those views between now and whenever we have to get something on paper.

The danger, I think, is that it is a perfect opportunity for confrontation--no matter how well intentioned we are--before we have a program, or before we have something that we feel would fly with all interested parties. And I am really terribly afraid that it is risky in terms of bringing together people who have had a long history of sitting on opposite sides of the table. And even though it is informal; and even though Members of the Commission are there to keep the sides from negotiating and bargaining,

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they are going to regard it as an opportunity to make points.

MR. HERSEY: What do you propose?

MR. PERLE: I would propose that the Commission, after having seen the views and studied them -- there will be a document -- will get whatever questions it has, and address them to the parties informally on the telephone, through the staff -- call them up, and say, "We would like to know A.B.C.D." Again, this is to keep written materials out of this. The more we have people writing things, the tougher it is for them to back away from it; and the more they are forced into positions.

Then let the Staff come back to us with an expression of what has been said, and then let us meet and see if anything further is needed. But just to have a session where they present more views, I think, is dangerous.

MR. WEDGEWORTH: I think I would like to support that point of view. I think I understand the objective of those who thought the retreat would be a profitable way to proceed, but I think I would support Gabe's position.

I have observed a number of sessions in which the parties that were considering / attempted to come together matters, and discuss or negotiate, or develop some kind of a dialogue, and they all seem to be the same. I think what it is likely to produce is not so much a confrontation, but a continuation

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of the kind of oratory -- and I must admit that the Commission has not been exempt from that -- that has tended to confuse the situation, more than anything else. And, looking at the long and short range objectives, what we need to do is to give some advice, on a short term basis, to the Congress as to how they should proceed immediately, and to give it our best judgement, and get it off of our agenda so that we can proceed with a long term objective of looking at some data that we have generated--or that we take from various sources--to give them a more considered opinion of the issues.

I think we could waste a lot of time in going to this other way of proceeding, when what the Commission needs to do is to simply come to grips with the task for which we volunteered.

JUDGE FULD: My view last night -- very tentatively advanced -- was that I did not think it would serve any purpose to seek a median amongst parties who have been trying to do so for several years.

I thought that our function would better be served if we were to prepare tentative guidelines, and submit them to the various groups; and get reactions from them. I think we are under a necessity -- time is going awfully quickly. I am rather discouraged at the slow progress that has been made. I think we ought to prepare tentative guidelines; submit them to the various contesting groups and, after getting their

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reactions, submit these guidelines to the Congressional Committee. I think it would be much more effective and, certainly, much more direct and it will, perhaps, bring to a conclusion the efforts that everyone is trying to make, to have the parties come to a conclusion.

VICE-CHAIRMAN NIMMER: Well, Mr. Chairman, I think we all agreed last night that that ultimately should be our procedure: namely, that we should not merely try to get an agreement between the parties -- which is most unlikely -- but that we should submit CONTU's proposed guidelines, but guidelines that we think are within range of agreement by both sides, even though there has been no explicit agreement by either side.

I suppose the rationale of this encounter, before, was the hope that that would lessen the areas of difference even though it would not eliminate them.

Now, many of you here have much more of a feel as to the psychological stance of each side, and whether such an encounter is going to increase or decrease the chances of minimizing the differences.

I am perfectly happy to go along with whatever those who are more in a position to know feel about that, but my feeling is that--whichever way we go--we should realize that we are not going to get agreement from both sides, but we are going to try to evolve our own document,

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based upon as much common ground as there is.

MR. PERLE: I respectfully submit that we are going to get agreement on both sides, but only upon the document that we submit.

JUDGE FULD: I think we should get to that immediately.

MR. PERLE: Let's do it just for the Commission.

MR. HERSEY: May I say just one more word for the kind of one-stage, before that, that Dan proposed last night.

I think the precedent, here, is the agreement between the Publishers' and the Authors' groups and the teachers -- on guidelines for copying for teaching. There, the principals did manage to come to an agreement, and the great strength of that agreement was that it was arrived at by the principals; and I think that one concern here may be that guidelines which may seem to be imposed upon the principals from us or from Congress, may be less effective in the long run than guidelines would be if the parties could arrive at them, themselves.

JUDGE FULD: There are as many differences betwixt them as there are groups.

MR. HERSEY: There are differences.

JUDGE FULD: With the teachers.

MR. HERSEY: No. There was not as long a history of controversy as this, it is true, but there were serious

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differences, and there still remain areas of controversy about it. I think the one hope was that one stage of conversation might open up a process in which --

JUDGE FULD (Interposing) I personally think it would be more effective if we imposed, upon them, suggested guidelines, and got a reaction.

MR. LACY: I am not at all wed, necessarily, to the idea of the retreat, but if I were in Mr. Levine's position as Chief of the Staff, and was asked to prepare a set of tentative guidelines for the consideration of the Commission, I would feel that it would be essential to have some opportunity to explore, with both or the several sides of this controversy, their reactions to a range of suggestions.

It is true: we have gotten responses from a number of people to the original queries, but those responses simply don't deal with some questions -- perhaps deliberately; and in some cases the questions just may not have arisen in their minds.

For example, we have suggested the possibility of different numbers of copyings might fall on one side or the other of the criterian in 108(g)(2)--depending on the kinds of material copied.

It might be one thing for an article in a 100-copy circulation translation journal; another for a journal of

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5,000-copy circulation; and perhaps quite different altogether for a mass magazine, or for a literary magazine. And we don't have any reaction to that. We have not sat down with anybody and said, "Look! Let's forget for a moment our present situation. What sort of system for the publication of articles do you want to see emerge ten years from now, and how can we shape it?"

There are a number of conversations that have not been had.

Now, it may well be that the kind of conversation which I would feel is essential to have -- were I in Mr. Levine's position -- could take place one at a time with the two sides rather than with both together. It would be more convenient. It would have a practical advantage of being able to be done more quickly than arranging a big meeting.

Certainly, I would feel perfectly comfortable with an arrangement under which the staff -- perhaps with the participation of some members of the Commission -- could explore, informally and without commitment, the reactions and the ideas and the views of the different groups involved -- to some of the kinds of questions that we have been kicking around in our informal discussions, as a preliminary to preparing guidelines.

I agree completely with the Chairman, that we will

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get a better result in the long run if we come to the sides with a specific proposal rather than await the process of agreement.

MR. DIX: Mr. Chairman, I was going to say something similar to that, I think. It does seem important that the members of the Staff feel that they approach this with some confidence.

I mean, really, I think, Art, that you ought to speak out and not defer too much because you are the one that has to do this job. I have thought of it since last night. I think I am more in favor of some kind of a face-to-face meeting than I was last night. At the same time, I think I am more opposed to the retreat idea -- that enforced proximity for a short time, it seems to me, is highly explosive and dangerous.

I can see a meeting in these offices -- a one-day meeting -- of various people who wanted to attend, being done very well, particularly if it did not have to be -- and I don't know the legality of this -- a public meeting. In other words, I don't think we want to set up any situation that encourages posturing of the various parties.

MR. LACY: One-at-a-time sessions might avoid some of that posturing, too.

MR. DIX: I really would like to know what you think about it, Art.

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MR. LEVINE: Well, two things:

(1) At the last meeting, I made the analogy to Henry Kissinger in the Middle East. I really don't think that the "sides" -- if you will -- in these issues are quite -- I think we are building up the difficulty of negotiating among the parties a bit. I think there has been a lot of controversy up to this point; and a lot of disagreement.

I think that 108(g)(2) has now been marked up in the House, and I think the parties -- and I think it is reflected in the communications that we have done -- are now seriously at the point of attempting to reach some agreement.

I have had second thoughts since last night, too, about the retreat approach. It just seems that we are going to get a lot of very busy people off for a couple of days and arguing simply to fill the time, because we have two days to do it.

My own feeling is that the best approach, now, would be for me individually to sit down with the Librarians, on one side, the Authors and Publishers on the other, and then, after that, bring the parties together.

As I say, at this point I think the situation is ready for resolution and, if we are not able to solve this and if, in fact, our efforts result in failure, it is really not CONTU's failure. It is the parties' failure.

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We don't want to face that as a possibility, but it seems to me the parties are now where they have to fish or cut bait and come up with some sort of agreement, and we will act as the catalyst in that situation; sit down with one group and sit down with the other group, and then bring the parties together.

JUDGE FULD: I really think there is enough expertise amongst the Commissioners and the Staff to accomplish this without too-long- detailed, face-to-face discussion.

VICE-CHAIRMAN NIMMER: Arthur's remarks were not clear to me.

Art, you were not suggesting, were you, that we simply try to get agreement between the parties, and not create our own guidelines that we hope, then, will lead to agreement?

MR. LEVINE: My thinking was this: that I get together with both groups.

MR. LACY: At one time?

MR. LEVINE: No. Separately; and decide at that point whether that is the time to attempt to draft some guidelines based upon areas of common agreement, or decide at that point whether we will bring the groups together and, after that, draft some guidelines for common agreement that reflects some common agreement resulting from that meeting. Then have another meeting, perhaps; or circulate those.

I think we cannot, necessarily, lay down too precise

an area right now but, at some point, we are going to have to sit down and, based on what we have learned from each of the sides, come up with guidelines.

Are you suggesting, in addition to what the parties agreed to, that we make recommendations above and beyond that?

VICE-CHAIRMAN NIMMER: If the parties do agree; that depends on what they agree to.

As we talked, the other night -- and Dan Lacy's letter previously suggested -- our duty as a public group should not be to simply rubber stamp anything the parties agree to. On the other hand, I think the reality is that, if the parties do agree, it likely would be acceptable to us, too. But, on the assumption that the parties don't agree-- then we will plan the alternative planning.

MS. WILCOX: I wonder whether it would not be helpful, since the Register of Copyrights is here, if she could say anything about the time framework that we are dealing with?

JUDGE FULD: That might be very helpful.

MS. RINGER: The Subcommittee is marking up tomorrow, and I notice Carol's notes here; which bring us up-to-date.

JUDGE FULD: We really have not had a chance to read them.

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MS. RINGER: Yes. I realize that.

The Subcommittee has twice addressed Section 118 -- which is the last big issue, the Public Broadcasting Issue -- I think, clearly, and it is coming, I think, to a head tomorrow. My prognosis is pretty good. I think that the chances of them adopting some language tomorrow on that are better than 50-50. They are probably quite substantial.

JUDGE FULD: Giving them a license?

MS. RINGER: Well, it has taken a different form, now. The Staff draft that is attached to these minutes called it "compulsory arbitration"; but I think that that term seemed to be dropped.

There is an element of oversight, or regulation, involved. I should hasten to add that non-dramatic literary works are not included in the Staff draft. Whether they get back in depends on what happens tomorrow but, at least, what has been put forward by the Staff does not include it. As of now, the scheme -- which is different from the 118 that the Senate adopted -- applies only to non-dramatic musical works and pictorial and graphic works, and does provide for a form of negotiation that would eventually lead to a determination of rates in terms of royalty payments by the Royalty Tribunal. It is a different system. I am not sure you can, exactly, call it either "compulsory licensing"--or "compulsory arbitration".

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There does seem to be some supporting craft around this. I think something like this will go, although variations are now under consideration. This is in a very, very fluid state, but everything looks pretty good.

Meanwhile, they went on to Chapters 2, 3 and 4, last time, and I believe finished their work on Chapters 2 and 3, and the material that is left on Chapter 4 is relatively technical and minor. I would say probably the main issue involves changes in the mandatory deposit provision that would lay the basis for setting up the television archives.

VICE-CHAIRMAN NIMMER: In Chapter 3, did they change the preemption provision?

MS. RINGER: Yes, they did.

MR. LEVINE: The language is in there.

MS. RINGER: It is in here. They did not change the "mis-appropriation". I think that is probably what your question was addressed to. They left that in; but they did change the leaving of sound recordings under common law, forever. In other words, under the amendment that the Senate had adopted, the preemption did not apply to sound recordings fixed before February 15, 1972, and they put in a date which is February 15, 2047. 2047! Ponder that for a while!

(Laughter)

MS. RINGER: In any case, I don't think this need

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concern us.

JUDGE FULD: We won't have any input on that!

MS. RINGER: I doubt whether we will!

The one point that was nervously approached and not quite tied down, was the term. But I think nothing will be put forward on the length of the term unless someone on the Subcommittee wants to raise it.

In Chapter 5 -- which we are now preparing -- there are a couple of items of unfinished business that are very technical. I don't think they need concern you. They may take a while in the Subcommittee. But we are almost up to the "Manufacturing" clause. I don't think that will take a good deal of time.

It is a little unclear what they are going to do on the Royalty Tribunal. I would say that, while it is not a flamingly controversial issue, there is still quite a bit of work to be done on that. It ties in with the Copyright Office and Royalty Tribunal interrelation. I would say that the chances of the Bill being reported by the end of this month are extremely good.

JUDGE FULD: Which seems to me to make it all the more important for getting agreement, or submitting guidelines, as quickly as we can.

MS. RINGER: There are two ways of handling this. There is only so much that this group can --

JUDGE FULD: Accomplish?

MS. RINGER: Yes! Obviously! "Accomplish," as a matter of input into the Subcommittee Bill, and I think this needs to be considered very carefully. It does not seem to me, on the basis of what I heard today, that it is possible for you to come up with an agreed set of guidelines by the time they will need to put their report in and have it published -- which would be around the end of the Democratic Convention, I would say, roughly. It is just not possible. I don't see how you could conceivably do it.

It is a very big question in my mind as to how the Subcommittee, in its Draft Report to the Full Committee, and the Full Committee, itself, will want to deal with this problem.

The Subcommittee will draft a report which will be the report of the Full Committee, when it finally acts. It will be fluid; but I would say that the Full Committee action will not take very long, either. The projected time goals involved are in the period between the two Conventions, for that. I don't think you can do that, either.

So that my feeling is that, somehow, this will have to be -- I don't like to say "glossed over" -- but dealt with in a provisional way that does not blow everything up. And I am very concerned about that! I don't conceal it from you. I think what I am really saying is that your goal

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should be the Conference Report--as far as input into the ultimate legislative history of this Bill--and that would probably be in August or September.

JUDGE FULD: You don't think a tentative submission of guidelines would prompt the parties to a more definitive conclusion?

MS. RINGER: Internally, as far as your activities, certainly; but I would not see this going into the Legislative format, in any form, until you are ready. I think that this might cause more problems than it is worth, although there may be others that have different viewpoints.

MR. WEDGEWORTH: I think that there is a tendency for us to confuse what we can do in the long run with this issue--with what we can do right here and now. As I look at the chart which the Staff provided to us, of submissions of information in terms of what input the Commission can have to the current legislation, I think that it is possible to do something quite directly.

The issues that I noted that really come up are few. There is the issue of, you know: How do you define aggregate quantity?

There is the issue of, on the one hand: How do you establish some internal controls in the Photocopying activity? On the other hand, how do you determine upon whom the burden of proof lies?

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Then you have two issues that I consider to be quite difficult. The three previous ones, I think, can be received directly from the submissions that have been presented, because there are not terribly many options there.

The two most difficult issues I see are considering whether there ought to be differentials for different types of libraries, and whether there ought to be differential treatment for different types of works.

Now, those, I would say, are the most difficult issues.

JUDGE FULD: Can we decide that amongst ourselves?

MR. WEDGEWORTH: I think you can, but I am saying that they are a little more difficult than the three previous issues and, for this reason, I would look at that and say that I think it is possible for the Commission to come to the point of making input to the report, based on the submissions that we have received and with some limited contact with the principals involved -- leaving aside the long term considerations of this issue.

I would just say that, personally, I would consider it extremely important for this Commission, at its conclusion, to have come to the point where it will recommend, to the Congress, provisions that will enter into any type of Copyright Law that establishes quite clearly -- somewhat consistent with Senator McClellan's letter -- says quite clearly what the

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rights and responsibilities are for the users, and what the rights and responsibilities of the copyright proprietors are.

I think in the long run it is quite clear that we have got to move in that direction, but we don't have the data to do that right now. We should admit that, and provide the kind of submission that we volunteered our services for providing, and go on with our real objectives.

MR. HERSEY: That is rushing it a little bit, isn't it, Bob?

Are you suggesting that we should get it in the process now, before the Subcommittee Report is ready?

MR. WEDGEWORTH: I am saying that we recognize that we are providing what we would consider to be tentative suggestions on the issue that will facilitate the current legislation. That is what we agreed to do. That it, by no means, will be a final resolution of the issue -- at least from my point of view. I don't see how it can be a final resolution of the issue, because it does not satisfy Authors. It will not satisfy Publishers, and it will not satisfy the interests of libraries and their users.

MR. HERSEY: What you are saying then is that we have to resolve this at this meeting.

MR. WEDGEWORTH: At this meeting?

MR. HERSEY: Aren't you?

MR. WEDGEWORTH: No. I am saying that we can define

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the task at this meeting, and move ahead to accomplish it, rather than saying that, "Well, maybe we ought to talk to this group. Maybe we ought to talk to this group."

Let's see if we can agree on what the issues are, and move directly to resolve them and make a submission to the Congress.

MR. HERSEY: I am for that, but I sort of misunderstood you.

MR. WEDGEWORTH: And say, "Do we agree that these are the primary issues"?

If we agree that these are the primary issues, I think we ought to have some discussion on how we feel about this, based on the submissions that we have received.

JUDGE FULD: I am not too sure I understand. I have a one-track mind.

You are opposed to our preparing tentative guidelines; submitting them and getting reactions?

MR. WEDGEWORTH: No. I am opposed to spending all of our time talking about processes and ignoring issues. I think the Commission, itself, ought to have some statements on record as to how it feels about the definition of aggregate quantity, before Art gets to the point of talking with the parties involved. That gives him a well rounded approach to the problem.

JUDGE FULD: I would think that we have in our own

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body, sufficient knowledge and expertise to answer the questions that are presented and that, on the basis of that knowledge and information, we should submit guidelines and perhaps get responses from it which will be the basis for submission to the Committees of Congress.

MR. WEDGEWORTH: I would tend to agree.

JUDGE FULD: It seems to me that, looking at the history -- even for the present moment -- it is impossible to get the groups together to agree. Therefore, we should submit to them and we should make the decision and get comprehension from them.

VICE CHAIRMAN NIMMER: I think there is general agreement with that approach. The only divergence was, first of all, to get further input from the parties in the hope that that would decrease their differences.

The other was that, then, the staff would go forward and draft tentative guidelines which would then be subject to our discussion.

Now, Bob is suggesting, I gather, that before that occurs, we should first get some input to Art for the guidelines -- which makes good sense to me.

JUDGE FULD: Do you suggest that we go to the questions?

MR. WEDGEWORTH: Yes.

JUDGE FULD: The Staff queries.

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Do you want to have the Staff Draft before you?

In what order would you suggest that we take them up, Mr. Wedgeworth?

MR. SARBIN: May I make a suggestion?

JUDGE FULD: Please!

MR. SARBIN: If the Staff has recommendations on the issues, or understands, on the basis of its informal discussions with the Members of the Commission, that there is a certain consensus--a certain feeling about it-- I would like to hear that as we start on the discussion of each of those issues.

JUDGE FULD: Is it agreeable that we take the items in order?

MR. SARBIN: Yes. Take the items in order.

MR. HERSEY: Mr. Chairman, before we do that, I would like to repeat what I said last night, for the benefit of the Commissioners who were not here then.

I think this chart - form of analysis, taking the specific suggestions of the various parties, does not give a clear picture of the thrust of the Authors' and Publishers' memoranda which, as I understand it, is that there are different sorts of animals here, and that one number on the aggregate quantity would certainly not meet the needs.

Not only does there need to be a consideration of possible variation in the number with respect to literary

work, as opposed to journal articles, but there may be a need for different kinds of works within the area of journal articles, and the Library memorandum itself suggested that there may be need for different treatment with respect to different kinds of libraries.

So I think there is a very fundamental issue that runs all through these items if you take them one by one.

JUDGE FULD: This is Item 6? Is that what you are talking about, on the draft?

MR. SARBIN: The Staff working draft, I think. Yes.

JUDGE FULD: The request to make a specific suggestion on treatment?

MR. WEDGEWORTH: Item 9, also.

MR. HERSEY: No. That deals with the issue whether literary work should be dealt with differently from journal articles, but it does not deal with the issue whether various types of journal articles might, in turn, be dealt with in different ways. Nor does it deal with the issue of Libraries, although there is an item on that in the chart. But I suggest there is an area here of fundamental philosophy about these quantities that may have to be thought about. This is one of the last few things that you talked about, Bob.

MR. WEDGEWORTH: Yes. I would agree, John. The only thing I would say is that it may be that

this -- as one of the more difficult issues, would have to be one that would be given greater consideration in the on-going deliberations of the Commission. I am not sure that we can arrive at that at this state, but I do think we ought to give it attention.

MR. HERSEY: Speaking on th. side of the Publishers and Authors, I don't think we would want a situation in which a formula had been agreed on, as the desirable basic formula, which did not take into account this fundamental philosophy.

Do you see what I am saying?

MR. WEDGEWORTH: Yes. I understand what you are saying, and I don't disagree. I am saying that, in a practical sense, it may not be possible within the framework of this particular responsibility. In the long run of the work of the Commission, I think we will have to come to grips with that issue.

MR. HERSEY: But it is inherent in this responsibility, if the issue of different types of journal articles is one of the things that should be considered, you see. That is primary.

This is one of the reasons, I think, it is very hard for us here.

Go ahead.

MR. SARBIN: If we don't proceed as we discussed before, and then simply allow for the kind of view that you

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are now expressing to be inserted into the discussion, how would we proceed?

MR. HERSEY: Well, what I am saying is: I think that, at our last meeting, in order to keep the atmosphere as open as possible, we drew back and said we would suggest that general principles be advanced in the first round by the various parties; and that has been done on the side of the Authors and Publishers. I think there is a need for one more round to get a little more explicit views from them about the actual specific recommendations that would be made.

JUDGE FULD: What do you understand is the view of the Publishers and Authors?

MR. HERSEY: I am not in a position to give that view, Judge Fuld.

I don't have that expertise. There have been people who have been discussing this for five years. I am in the analogue of a Librarian. I am not qualified, as Bob is -- nor do I think Dan is, although he knows much more than I do about all of this. I don't mean to suggest that you should not say that you <u>are</u> qualified!

MR. LACY: I agree.

MR. PERLE: Most of what I am going to try to say I said last night. Over the years, I think that the peopl on both sides have been groping toward solutions, and have

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more or less reached agreement in certain areas on both sides, without really being aware of the fact that they have reached agreement.

I think we can tackle it, right now, by breaking the whole question down -- not as was done here by specific questions, but by approach.

First, what are we talking about in 108(g)(2)?

The controversy is not the universe of the written word but, rather, as I read it, technical, scientific, and scholarly publications; periodicals; journal articles. So that I would take an approach of having a draft written up which first says: This is the subject matter. The other subject matter is subject matter of various positions.

Second: What type of journal article are you talking about?

The problem arises with recent journal articles and--if you chart the demand for journal articles--I understand that the demand comes up for photo-reproduction and Library duplication, of the journal articles soon after they are published and, when they appear in the indices, that is when the big thrust comes.

I don't think anybody -- Librarians or Publishers alike -- is concerned about library copying of 10-year old journal articles. So that we can tackle it that way.

Next, having done that, we come to the type of

Library copying reprography that we are talking about.

First, there is the substitute for the manual note-taking of the person within the Library. That is one type of reprography which is quite easy to deal with, I think, because that which is a machine substitute for the person physically sitting within the Library at a counter and copying things out, is not as difficult as regarding the retrographic machine as a printing press.

So we have the face-to-face request for a duplication of material within the library, itself. That is easy. The tough part comes when you ask: How do we properly regulate that which we have already narrowed down -- when one library, at the request of one of its clientele, is requesting another library to supply materials to it and, at that point, has a purely interim solution. We can go into the quantity -- not quantities as it is now phrased -- but quantity of material that is the appropriate quantity, to say, "That is enough! Go subscribe!"

There is another factor, here, that was pointed out by Ms. Wilcox: which is that there is a self-policing element in this, on the Library end, which is at the cost of making an inter-library loan -- and correct me if I am misstating you -- and reaches a point where, after you have requested a couple of them, it is cheaper to subscribe than to reques another library to supply it to you. So I don't think, if

we break it down this way, that it is such a tough problem. I think that if the Staff and Members of the Commission are willing to sit down together, they could, along these lines, come up with an acceptable mechanism in not too much time.

I mean, those of us who are lawyers are faced with problems a lot more complicated than this. There, we have specific guidelines. There are time deadlines. You have to appear before Judge Fuld in the Court of Appeals on June 27. You have to have your brief ready. How are we going to do it?

I think it is just a question, not of spending the time now, but of getting the Staff and the interested Commissioners to sit down and, if necessary, have another meeting of the Commission in a hurry after they have prepared something, and do it. But I think we should just do it.

JUDGE FULD: What is your suggestion? I gather that it is hard to find ways to do it.

MR. PERLE: If you want a suggestion, I suggest that, next weekend, or next week at whatever place, whether it be here, or our offices in New York, or in Washington --

MR. WEDGEWORTH: Or my office in Chicago, or Mel's office in Los Angeles.

MR. PERLE: I think it is probably more convenient here -- that the Staff and the interested Commissioners sit down and start writing something and circulating it as

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soon as possible among the rest of the Commissioners.

VICE CHAIRMAN NIMMER: Mr. Chairman, isn't the immediate question whether we follow Mr. Wedgeworth's suggestion of first, at this meeting -- if there is time -- giving some input as to the substance? Or whether the first input of substance occurs at the meeting that Gabe speaks of?

I have no strong feeling about it, but I think we should make a decision on what we are doing.

MR. PERLE: With all due respect, I do have strong feelings. I think we can give input only addressed to a specific tangible approach.

VICE CHAIRMAN NIMMER: That is what I am talking about. Either do it here, or there.

MR. PERLE: I move -- I don't want to "move" -- I encourage that it be done there, not here. I think that here, we are just going to waste our time, if we try to do it now.

VICE CHAIRMAN NIMMER: Why is the frame of reference available there and not here?

MR. PERLE: Because I think there are enough people on this Commission who are aware of all of the arguments Bob can give them to you. Dan can give them to you. I can give them to you. Bill can give them to you -- at all sides. At this stage of the game, Bob Wedgeworth can argue the

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Publishers' side as well as he can argue the Librarians' side.

VICE CHAIRMAN NIMMER: Why isn't that going to occur when we meet at your office?

MR. PERLE: Because if we do it just head-to-head, manhole-to-manhole, I think--with all of our fixed positions aside -- all of us, as Commissioners, can rise to the job of being Commissioners, rather than parochial representatives.

VICE CHAIRMAN NIMMER: I still have not heard why the different requirements are necessary.

MR. SARBIN: I will give you a reason. As I look at my watch, we may have 15 minutes in which to do it here, and that won't get us any further than we have gotten in the last 15 minutes. I just think that that is probably the best idea under those circumstances and, certainly, the session to do that is going to take some hours.

I am satisfied to have the Staff address itself to these issues, and do these things, and then have the interested Commissioners -- those that are able to -- meet with the Staff, and iron out any differences that there might appear to be.

MR. LACY: But I take it that you are not thinking of a formal meeting of a designated Subcommittee on the record--but an informal discussion of the Staff.

MR. SARBIN: Yes. I think so.

JUDGE FULD: I thought that is what was suggested

initially: that the Staff prepare a tentative set of guidelines; take it up to the Commissioners, and those Commissioners have the expertise and knowledge to consider it as quickly as possible by the entire Commission.

I would think we would be able to do it today, but if time does not permit, perhaps we cannot.

MR. WEDGEWORTH: We can all do it tonight.

MR.FRASE: I think if we are going to do it this way, the Staff has to know whether the Commission accepts Perle's recipe -- cutting this thing down to technical, professional periodicals in a certain limited time frame, and ignoring everything else.

VICE CHAIRMAN NIMMER: Well, taking the two separately: First, on the time frame; I agree. I agree on the substantive point that the only real dispute, I would think, is as to current and relatively current materials. But I don't know how far that takes us. That is like saying that we don't have to worry about work in the public domain when we talk about copyright. Well, that is true, but it still leaves the disputed area.

On the question of limiting it to scientific publications, that, simply, presents more difficult problems. You have the text of 108 which clearly is not limited to scientific publications. So that if the guidelines -- which are, ultimately, we hope, the Legislative

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commentary by the Congress -- says we are only talking about scientific publications, that could have one of two possible consequences.

It could mean that they are saying that 108 does not mean what it says -- it really only refers to scientific publications, which is a possible interpretation. But I think that is a very difficult way to control the Statutory language. That is, when you have ambiguities, you look to the Legislative history but, if it is not ambiguous, then to have that kind of a contradiction in the Legislative history is something that the Courts are going to hesitate to go along with. They might, or might not, but it seems to me doubtful that they would.

It is true that there is one theory of Statutory interpretation that, when there is an ambiguity in the Legislative history, then you look to the Statutory text but, usually, it is supposed to be the other way around.

So, if the thought is to control the substantive content of 108, and eliminate from 108 anything but scientific journals by the Legislative History:

No. 1: I don't think it is going to fly, as far as the Courts are concerned, which is the ultimate question. But even if it would fly, as far as the Courts are concerned, I wonder how the Library people feel about that. I don't know.

Are they unconcerned with 108, except in the

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scientific areas?

MR. WEDGEWORTH: Let me just answer that directly. It came up very early in the discussions over the past several years. I must admit this is a point of view that has been pursued by, primarily, publishers. The librarians I have talked to have never been prominent in pursuing that point of view, for the very simple reason that either they know something about classification and indexing that we don't know that will allow you to clearly divide scientific and technical publications from other types of publications, or it just is not a practical thing to pursue. I just don't see how it is possible. Apart from the legal difficulties, you know, it just is not possible to divide them.

VICE CHAIRMAN NIMMER: Suppose it were, Bob. On substance, would there be no problem?

MR. WEDGEWORTH: Well, yes, but that is just a difficult "if"; that it just defies a logical view.

MR. HERSEY: I would suggest one clear difference, from the side of the publisher and author, is: Is the author paid for the work?

MR. WEDGEWORTH: That does not define "scientific and technical". For example, the Russians' definitions of what is scientific are completely different from ours.

MR. HERSEY: Well, there <u>are</u> difficulties!

MR. WEDGEWORTH: We never disagreed. We just

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said that it was not practically possible.

MR. LACY: I don't think the difficulties are insurmountable--if one wants to surmount them. Obviously, you are never going to get a criterian as to which there is no dispute about its application to a particular thing, but if one said, for example, that there was a different quantity or, essentially, no quantity, if what you were talking about was a short story, an essay, or a poem, the number of disputes would be negligible. In any event, these things are not coming up for adjudication before Courts. They are going to be applied by Librarians in good faith in their day-to-day practice. The Librarian, in good faith, really has no difficulty telling the Atlantic Monthly or the Partisan Review from a journal on Subatomic Physics. He really does not. That is not a real problem.

MR. DIX: The Librarian does not, but the fellow operating the Xerox machine has a great deal of trouble. And certainly we don't want to have trained professional Librarians operating Xerox machines!

MR. LACY: There is no question, in all of Copyright, that you can't say, "It's impossible to draw a fine line." There is not and, basically, we have to recognize that. You can tell major differences, if you want to.

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MR. WEDGEWORTH: Is it important, though?

MR. LACY: Yes, it is very important -- absolutely crucial to reaching an agreement!

MR. WEDGEWORTH: I can understand John Hersey's position saying we ought to make some distinctions for literary work, but this, to me, doesn't really mean that we then have to go and define what a scientific/technical publication is.

MR. LACY: No. I don't think you have to say "scientific and technical" works, but I think literary works have got to be exempted.

MR. WEDGEWORTH: All right. But the issue is determining the differential works that need special treatment--which is the obverse of defining what scientific and technical publications are.

MR. PERLE: Well, if there is some sort of consensus, then -- that is what you are reaching for -- then it is a question of semantics. I think no language ever satisfies all of the demands on that language--so it has to be interpreted. But I think there are enough people who define the line well enough so that you can say, "108(g)(2) is an additional right over and above 107."

So that what you can say is for the purpose of 108(g)(2). These things have one set of rules; the others have another set of rules. There is a guideline. You can

phrase it in a way that is fairly specific. You can never reach absolute certainty, but, after all, that is why lawyers make money, because we have to resolve those differences when those questions arise and every Statute has some ambiguity, and every guideline has some ambiguity.

But I think we can reach for it, and I think we can solve 99% of the problem areas.

MR. WILCOX: This discussion seems to indicate that there is a need for definitions, but we are not in complete agreement on where it could be. It seems to me, perhaps, that earlier in the discussion we were talking about procedures of how we would proceed. There was some difference there -- one being that the Staff would prepare these guidelines, and the other being that the Commission would participate actively in this. That can mean maybe, a crucial thing: whether the first cut through these guidelines is done by the Staff after whatever direction we had this morning, or, indeed, whether it is done by Commission input at the time the guidelines are written.

MR. LEVINE: What concerns me, in part, is the time and we can send drafts back and forth among one another and spend a lot of internal activity on it without going out to the parties that are the ones that are involved, and to whom we have offered our good offices to assist.

It seems to me we have expertise, obviously, on this Commission but, for the most part, it is not the people who

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have been negotiating directly, and those are the ones that have, I would think, in their minds at this point what they understand "aggregate quantity" to mean; the distinctions between "scientific" and "technical" and other works; and I would like to hear what they have to say about what they are thinking about, and see if we can't begin pulling people together rather than spending a lot of the Commission's time deciding how we are going to go about getting these people together.

I think the time is ripe for me to sit down with these people, with some questions -- with questions, without necessary definitions or answers.

MR. WEDGEWORTH: Is that a rejection of Gabe's approach?

MR. LEVINE: A modification -- probably a rejection. Probably a rejection.

MR. PERLE: I feel rejected. I reject the rejection. In all due respect, Arthur, I think that is not a good source.

MR. SARBIN: In the interest of preserving your voice, I don't find a real incompatibility between these ideas. It seems to me that your discussions with the parties at interest, may be more meaningful if you start out with something on paper that says, "This is what we think" and if, informally, you are able to get some input from the

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Commissioners who are concerned, into that.

It does not mean that you need consensus. What it means is following a process that I certainly find very useful in our business, which is to do a first draft and let everybody see it, because then you will get input. Or let everybody discuss it. Just put something down on a sheet of paper, Arthur, that is a basis for discussion.

MR. LEVINE: That is really fine! I did not really mean that I was rejecting Gabe's position, but what I am concerned about is a great deal of activity within the Commission. Section 108 was marked up on April 7. We sent out our letter approximately two weeks after that. The last response that we received was mailed to us on June 1 and things have to be speeded up. That is what concerns me.

I would suggest that, rather than -- I think this weekend is too early. I think next weekend is too late. I would suggest perhaps at the end of the day on Wednesday, next, that we can get together here, there --

MR. SARBIN: Having done some preliminary work.

MR. LEVINE: Oh, yes. Obviously. That will give us a few days to get some preliminary work done on it.

JUDGE FULD: I am not too sure what the arrangements would be.

Would it not be feasible to -- is there no one amongst us that has a judgement as to what the number ~~should~~

should be--after all of the discussion and after all of the years, what the quantities should be -- forgetting for the moment the differentiation between different periodicals and books.

MR. FRASE: The two sides are pretty far apart. One says "two", and one says "ten".

JUDGE FULD: And some say "none".

MR. WEDGEWORTH: There are times when several of us may wish to be Czars and just resolve the problem directly, if that is what you are asking.

JUDGE FULD: I would think that would be our function.

MR. SARBIN: Do you want to do a Commission pool?

JUDGE FULD: After all these years?

MR. SARBIN: Put the numbers in a hat, and pick from one-to-ten.

JUDGE FULD: Well, you are not going to get any more helpful suggestions from the contending side.

MR. SARBIN: No, but I would feel better about it if what I had on the table was all that experience that the Staff has had and us just saying, "Here is the way to do it."

I would feel better about it than I would pulling it out of a hat.

JUDGE FULD: But we have the hat here!

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MR. SARBIN: I know.

MR. WEDGEWORTH; May I make a specific suggestion since we are running out of time for this discussion?

I would like to suggest that a few of us get together at the conclusion of today's meeting and come to an agreed-upon procedure that we will present the first thing tomorrow morning. I think that would save us a lot of time on how we proceed.

JUDGE FULD: Yes. I think that entitles us to a break and a cup of coffee.

(Brief recess.)

JUDGE FULD: It is now our pleasure to hear a discussion about software protection by two authorities in the area.

The first speaker is Mr. Nicholas Henry. He is Director for the Center for Public Affairs of Arizona State University at Tempe, Arizona.

He is the author of Works on Copyright and its Role as an Instrument of Public Policy.

His interest in research is mainly in the assessment of the effects of new information technologies under the development, distribution, and use of knowledge in a highly technical, democratic society.

His publication on Copyright and Public Policy earned him the 1974 Author of the Year Award from the Association for Scientific Journalists.

One of his books is: Copyright Information, Technology, Public Policy.

It is a pleasure to have you here.

STATEMENT OF NICHOLAS HENRY
ASSOCIATE PROFESSOR OF PUBLIC AFFAIRS AND
DIRECTOR, CENTER FOR PUBLIC AFFAIRS
ARIZONA STATE UNIVERSITY
TEMPE, ARIZONA

MR. HENRY: I am very pleased to be here before you this morning. In fact, four Members of this Commission are mentioned in this book.

JUDGE FULD: Only four?

MR. HENRY: Yes.

My interest in public policy for the new information technologies, while longstanding, does not derive from being an advocate of a special interest group, computer scientist, or lawyer. I am none of those. I appear here simply as an owner and user of copyrights but, paramountly, as a citizen hopeful of seeing an extraordinarily complex facet of public policy finally resolved in a way that promotes the public interest. So my comments on the elusive question of copyrights and computer programs should be heard in that light.

A computer program may be defined as instructions that set a computer's switches, in order that it can function in a particular way. There are three kinds of programs:

Systems programs which control the operations of the machinery itself; such as an operating system, or an

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executive system:

Application programs which solve particular problems, such as the various programs used by scientists; and

Utility programs which can be used by a variety of users, such as a debugging program that corrects mistakes in other programs.

The question of registering them is a hazy issue. Copyright owners contend that Copyright protects the programmer's expression and the effort required to compile some kinds of programs -- not the program's idea -- and that copyright thus provides motivation to produce computer programs by distributing its cost among its users.

Since 1964, when the first copyright for a computer program was registered, only 1200 programs had been registered by late 1975. This low number indicates that program developers find copyright unsuited to their needs. There are several reasons for this. One is that systems programs frequently are sold by computer manufacturers as part of their sales package and development costs are absorbed in those sales.

Utility programs, which one might think should derive the greatest benefit from copyright, are accompanied by expensive supporting items, such as documentation annuals, debugging arrangements, and periodical hardware adjustments that are made specifically for the individual client. The cost of these supporting items often equals or exceeds the

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cost of the original utility program. This is a fact that tends to undercut the suitability of copyright for even these relatively mass-oriented computer programs.

It seems possible that copyright protection might be appropriate for certain kinds of systems programs and utility programs -- such as those that are generally usable, off-the-shelf, low-priced programs which are sold separately from computer hardware, and to widely dispersed buyers who would be unlikely to find it practical to agree on time-sharing arrangements. But copyright does not now appear to be a public policy that benefits the distribution of informatio as it is formatted to most computer programs.

Finally, application programs which, by definitio must be written in accordance with a particular user's needs, account for about 60% of all program development costs. These individually-tailored programs are hardly compatible with mass-oriented copyright concepts. Beyond such broadly-based caveats, however, application programs have particular utility for academic researchers, and copyrighting applica-tion programs could hinder their usefulness to researchers.

Let me focus on my own field -- public affairs -- for explaining these potential disadvantages.

The Interuniversity Consortium for Political Research -- the ICPR -- at the University of Michigan, for example, would probably be very vulnerable to copyright

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legalities concerning application programs, because the Consortium serves as an effective creator/distributor of such programs. Take OSIRIS III, which is a set of programs of substantial utility that is available from ICPR. OSIRIS III is the end-product of at least three different groups of "creators"; ICPR staff members, staff members of the Survey Research Center of the University of Michigan, and "other" contributors, such as members in the Department of Political Science at the University of Michigan.

Had ICPR or any of these groups of OSIRIS III's creators opted to copyright all or parts of OSIRIS III, then considerably inflated transaction costs would plague the operation of the ICPR, and likely would prove expensive to member universities. In other words, permission would have to be obtained from the copyright owner or owners before the program could be distributed and used, and the charging of use fees could be extracted, by owners of the copyright, from users of the code.

Such a charge could have a particularly detrimental effect on students, since many departments of public affairs, public administration, and political science use application programs for educational and training purposes. Increasing the transaction costs probably would be felt most keenly by students since faculty are wont to consider their own needs first, when limited departmental research budgets are allocated.

Coming back to the larger picture, what are the more general advantages and disadvantages of copyright protectio of computer-based data and computer programs?

The advantages of the copyright protection seem reasonably straightforward. One such advantage is that registering a work in the Copyright Office is simple and cheap--which is not necessarily the case in patent registration or trade secrets protection, and also, under copyright law, once infringement is proven, a copyright owner can collect damages even though no actual damage is demonstrated.

These advantages of copyright protection of computer systems are predicated on the notion that such protection of the program developer is, indeed, desirable as a public policy, because it facilitates the growth and use of knowledge. Many of the disadvantages of copyright as a public policy for computers are premised on the same presumption. For example, copyright does not protect the original idea behind the program. Rather, as a concept -- at least as it currently is expressed in S.22 -- prohibits only the outright copying of the program and not the originality, creativeness, and inventiveness of the program's designer, as patent protection is designed to do.

Second, copyright protection probably would not protect against a computer "using" the program. This certainly pertains to fair use, but, I think, more directly

to a related court-created idea.

In 1879, the U.S. Supreme Court ruled in Baker v. Seldon (101 U.S. 99, 26 Lawyers Ed. 841) that the "methods and diagrams" used in an art book for purposes of showing ~~the reader how to improve his art book for purposes of showing~~ the reader how to improve his art were not protected by copyright. Such techniques were "necessary incidents to the art, and given therewith to the public," because they were used "for the purpose of practical application."

This decision still stands and, in 1967, the Deputy Register of Copyrights relied on it in explaining copyright and the computer use of computer programs, and said, "If you had a copyrighted program which somebody finds it necessary to use, such use is not an infringement."

I am not sure, but I think that the Information Industry Association, in the testimony given last month by its president before the House Subcommittee, interprets Baker versus Selden differently. By arguing that the holding, in effect, protects the program developer "against copying of the discretionary elements" found in his or her program, the IIA seems to be contending that, indeed, a program's "methods" are, or at least should be, copyrightable. It appears to me that "methods" in a computer program simply are the end-products of a developer's series of "discretionary" judgments that were made precisely to develop certain "methods"

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which are suitable for "practical application."

So the very fine line drawn here by the IIA between "discretionary elements" and "methods" strikes me as (a) fine to the point of transluscence, and (b) designed to undermine the reasonably valid distinction made in Baker versus Seldon.

Finally, policing the use of computer programs, as with the photocopying of copyrighted works, is extremely difficult. In both cases, technology has skipped away from the cumbersome authority of the State. As the president of the Computer and Business Equipment Manufacturers Association noted to this Commission: "The proprietor of a program is literally at the mercy of anyone with an office copier or computer."

He believed that the enactment of stringent copyright protection of computer programs would change all that. I am less sure. Is it really practical to believe that the State can enforce copyright as applied to the new information technologies?

And if it is not deemed practical, then should the State enact a law that everyone knows to be unenforcible?

The institution of government, and the very concept of justice in this country, are enduring enough popular contempt as it is. Why, then, add to that contempt by passing laws which can be enforced -- even under the most

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optimistic foreseeable circumstances -- only sporadically?

Now, these advantages and disadvantages that I have very briefly reviewed/are practical ones. They implicitly assume that some kind of public control is needed over the use of computer programs.

There is a far more fundamental issue: Should information needed for computer manipulation of knowledge be limited at all?

Copyright was really not designed with computers in mind, and, as the president of the Computer Industry Association observed last month to this Commission, his is "an industry which has been burgeoning without copyright."

In an extensive study of copyright and computers, the Ad Hoc Task Group of the Council on Scientific and Technical Information of the Federal Council for Science and Technology observed that "copyright may hinder the maximum efficient use of national information systems."

The effects of such hindrances would squelch the growth of information systems within the disciplines and, perhaps, render illegal, abstracts of articles now used in information systems, and delay inclusion, or possibly exclude, some information from systems, even after the copyright owner is contacted.

In response to this view, the owner-based argument, as I understand it, again states that a major value to be

derived from protecting computer programs is that the "little guy," the "Mom and "Pop" software developer, would have a fighting chance in a marketplace dominated by corporate giants.

This argument is a reasonable argument, but it also should be at least recognized that, in economic terms, it has significant parallels with a public policy recently overturned by Congress as being not in the public interest: fair trade. Fair trade laws, originally designed to protect the "Mom and Pop" enterprise by fixing price levels for certain goods, may indeed have done so. But the resultant higher-than-market-level price was paid by the consumer.

Similarly, copyright, by giving the developer the power to inflate the price of his program beyond that which normally would be charged in a competitive market, would increase the costs of the program user. Now this possibility may not negate the "Mom and Pop" argument, but neither should it be overlooked in deciding the software issue.

More significantly, I think, copyright appears to be growing increasingly irrelevant to the actual and practical development of computer-based information systems. In an interview published in 1973 in Publishers Weekly, John Price -- who was the Director of Exxon Corporation's Information Center -- stated that publishers and other copyright owners should solve the theoretical and technical problems of new modes of communicating information "before worrying so much about

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the legalities of copyright." Price, certainly, has not worried about such legalities, and is a managerial leader in the business of business information. He believes -- and possibly rightly -- that these businessmen "are going to have to restructure their ways of doing business" in light of the new technologies and the new patterns of informational needs and use.

Now, Price's comments lead me to a final area of concern. It relates to the software question. But let me broach, in concluding, a much broader issue.

Copyright, as a public policy, has lost its elegance. If we are to define "elegance" in terms of political economy, simplicity, and Mies Van der Rohe's dictum that "less is more", then copyright law is no longer elegant. It is nitpicking!

Section 110 of S.22 provides a fine example of this. Section 110 deals with, among other items, classroom teaching, instructional broadcasting, and certain "not-for-profit" exemptions, as they relate to the notions of "performance" and "display", and, in this regard, pertain directly to the software issue. By its very complexity and "nitpickingness", the Section implies that the copyright principle no longer may be adequate as a public policy for knowledge management in a society possessing a high level of information technology. While this is true for several

other sections of S.22, Section 110, as amplified by Senate Report No. 94-473, is perhaps the most self-evident example of the intellectual difficulties that policy-makers have had in trying to equitably adapt a concept of public policy that has been outstripped by an information revolution.

This policy myopia becomes all the more apparent when we read some of the clauses in Section 110. There are subsections exempting from copyright, certain kinds of religious performances; performances occurring as a part of an annual agricultural or horticultural affair; where the sole purpose of the performance is to promote retail sales; the admonition that "face-to-face" teaching does not necessarily mean that a student and teacher have to be staring at each other; that reading aloud a non-dramatic literary work constitutes a "display", which would not require the copyright owner's permission, but that acting it out as a "performance", would; that, in certain cases, a "fee" paid to a performer could necessitate permission from an owner to use his work--but not a "salary"paid to that same performer using the same work.

JUDGE FULD: What do you suggest?

MR. HENRY: I don't know! I am not saying I have the answers, at all.

Last, but not least, that teaching activities

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involving "performances or displays, whatever their cultural value or intellectual appeal, that are given for the recreation or entertainment of any part of their audience", are subject to infringement suits by copyright owners. With that stipulation, the Senate came out foursquare in favor of boredom in schools.

The point is: that when policy-makers start addressing themselves to policy issues in terms of this kind of microscopic detail, the public policy in question begins to lose some of the breadth and elegance that -- I think, at least -- is essential to sound policy.

I, too, regret this greater complexity and movement for something like the Internal Revenue Code.

VICE-CHAIRMAN NIMMER: Is it your implication, then, that the Internal Revenue Code likewise is inelegant, as you define it -- as surely it is -- and should be abolished?

MR. HENRY: If you say taxation should be abolished, I don't see that as a practical alternative.

I do say -- again, just speaking as a citizen on the subject of taxation, about which I have no expertise whatsoever -- I rather like Secretary Simon's proposal of either 20% or 40%. Damn! No exemptions.

That is what copyright, in terms of a broadly defined policy originally, was. The copyright owner had exclusive license to publish within a certain time frame.

VICE-CHAIRMAN NIMMER: Under the existing law, there are complexities that are nowhere in the same degree as are proposed in the new law.

MR. HENRY: Sure! Right. I realize the dangers, to some degree, here, because what I am implicitly saying -- and I regret this as much as anyone -- is that we should be led by the nose by technology, at least until we sic know more about it. I don't like that, but I guess I kind of tend in that direction.

VICE-CHAIRMAN NIMMER: You are also saying that if laws are complex, it is better not to have laws.

MR. HENRY: I am not saying it is better not to have laws.

VICE-CHAIRMAN NIMMER: It would be best to have simplified laws, but if simplified laws don't do it, then no laws are better than complex laws?

MR. HENRY: I haven't gone that far. What I am trying to do here is simply point to the desirability, if possible, of keeping life simple.

VICE-CHAIRMAN NIMMER: I come from Gerry Brown's State, but I cannot fully subscribe to that!

MR. HENRY: I come from Barry Goldwater's State.

(Laughter)

MR. CARY: For the record, if I may, when the first draft of the Copyright Law appeared, it was considerably

more simple than you see it today.

MR. HENRY: Yes, sir.

MR. CARY: And a good part of the confusion and the nitpicking -- as you call it -- took place because people who felt themselves aggrieved went to their Congressmen, and their Congressmen made changes, over the years. And this is the way our laws are made.

We can draft beautiful, conceptual articles, and then try to get Congress to pass them and you would not recognize them!

MR. HENRY: No. I fully appreciate that. And, again, the tax laws are a good example of that process.

MR. LACY: And the details, in almost every case, are added by people seeking exemption from copyright -- not by the people who wanted copyright protection.

MR. HENRY: That is one way of looking at it.

MR. LACY: It is the truth!

MS. KARPATKIN: I was interested in your analogy to the fair trade laws. There seems to be a broad spectrum of agreement today--ranging from President Ford to consumerists--that much regulatory legislation unnecessarily keeps prices high and prevents market forces from operating to produce a good market price for the consumer.

What do you think the consequence would be if there were no protection whatsoever for computer software

except the trade secret protection that now exists in the law?

MR. HENRY: Well, I guess I am as much an expert in this area as anyone, simply because I don't think anyone could tell you what the consequences would be--with any degree of certainty.

According to what I read from various computer groups in their testimony, my overall impression is that it doesn't seem to make a great deal of difference. They could probably live without it. That is what I gleaned from those groups -- from testimony presented by those groups. Now, they might well deny this is the case, because I think they might prefer having it but, as the president of the Computer Industry Association said, this industry has done very well without it.

MS. KARPATKIN: Where do you think the consumer interest lies?

MR. HENRY: The cheapest possible price for the product!

MS. KARPATKIN: And do you think that that would develop if there were no protective legislation?

MR. HENRY: I think it would be more likely to-- but the dangers of that would have to be recognized. It could discourage innovation on the part of computer programmer creators.

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MR. LACY: Aren't you suggesting, Mr. Henry, that there should be no price?

MR. HENRY: No. I am not suggesting that, Mr. Lacy.

MR. LACY: Well, why should anybody pay-- if he is free to use it without payment?

MR. HENRY: Well, they would simply pay the owner -- the distributor.

MR. LACY: Well, why should he pay the owner?

MR. HENRY: Not under the copyright law; just under the law of fair trade.

MR. LACY: What for?

MR. HENRY: Because not to pay for it would be thievery.

MR. LACY: Suppose you don't have a contract with the owner; yet you come in possession -- in due course -- of his program.

Why should you pay the owner anything?

MR. HENRY: Perhaps you should set up the situation a little better for me. I am not following you.

MR. LACY: Suppose there were no copyright in books.

MR. HENRY: All right.

MR. LACY: And you wanted to make a movie from a book. You were not under any necessity of paying the author or the publisher. You could presumably, make the

movie cheaper -- theoretically, it would be cheaper because there is no payment. If there is any payment, there has to be some kind of protection.

And the question is: which kind of protection more openly makes the material available? Does it make it more available if the protection comes by trade secrecy and restricted contract and restricted licenses, so that everybody keeps his program under his vest, and makes it known only to people who have taken an oath they won't let anybody else use it?

Or is it more available if he has some legal protection other than locking it up in trade secrecy?

MR. HENRY: If you are posing this question as an alternative as to which is going to provide the owner with more protection -- trade secrecy or the copyright law --

MR. LACY (Interposing) I am saying: Which is going to make it more available to the consumer?

MR. HENRY: Oh!

MS. KARPATKIN: That is not the same question as the "price" question, though, is it?

MR. HENRY: In terms of making it more available, I don't know much at all about trade secrecy, frankly. As a policy, I would have to guess: copyright, simply becaus it is a simpler policy.

MR. LACY: The law of price is one of two things: It is two different people coming into possession of the same program and, because each of them is free to exploit it, there is no exclusive right. They compete against each other in re-selling what the guy created.

Or, alternatively, it comes to two different programs: two authors having each written a program addressed to the same problem, competing and offering it for sale.

Obviously, if a man has some protection to enter this competitive market and can really sell his product -- not give it away -- I think you have a good case to assume more producers are going to be competing with each other to produce more programs for that market at, perhaps, a lower price -- if you are assuming that he is going to pay a price at all.

If you are assuming that there is no need to pay a price because there is no need to seek permission to do the work, then you are not talking about lower prices. You are talking about no prices.

MR. WEDGEWORTH: Well, if you are going to address that question, isn't it simpler to look at what happens now?

Let's take, for example, two very widely used programs: the biomedical programs that are used for

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statistical purposes, and that social-science statistical package that is made widely available.

What controls the price for those?

What protection does the consumer have in getting access to those materials?

I think that the real thing for SPSS, for example, is that most people buy the documentation in printed form, which is under copyright. Access to the program is nothing--for most of the users.

I think we can look at what happens, now, and gain a great deal more than creating a hypothetical situation.

JUDGE FULD: Had we interrupted your statement?

Is there more to come?

MR. HENRY: No. The only thing I was going to say is that, when this happens--when the law gets this detailed and policy gets this detailed--it becomes pedantic, lawyerish, and crablike. When this happens, it is a sign that the policy is predicated on a premise that is no longer suitable. I think that this may be the case with copyright law, and there is no better illustration of it than Section 110 of S.22. I think 110 is a very good example of that process which may be unavoidable.

JUDGE FULD: What can be done about it at this point?

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I would be very hesitant to make a specific recommendation as to what could be done. It may be that this idea of a moratorium should be reconsidered, just to see what the technology does. When you look at the original -- when this public policy started in 1955, which is the date I place on it, when Congress commissioned the Library of Congress to inaugurate studies -- you know, this has been going on for 21 years now; and when they were originally talking about "information machinery", they were talking about juke boxes. You know, this is how far technology has gone, and this has changed the whole complexion of the law.

JUDGE FULD: Thank you very much.

MR. DIX: Just a brief question.

Just to pursue this train of thought that Mr. Lacy started here: You have been concerned with, and thinking about, the public interest.

What would happen if, indeed, there were no protection and if, indeed, computer software were not regarded as a saleable commodity at all -- just in your view? In terms of public interest.

MR. HENRY: You are creating a situation here, Mr. Dix, saying that you are going to get computer programs working "for free"?

MR. DIX: Yes. That is, you are going to have no

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legal mechanism that prevents anybody from getting that.

As Mr. Lacy said, if there were no protection, presumably, there would be no price; then, let's pursue that.

MR. HENRY: Addressing your specific question, "not having copyright applied to the computer program", it does not necessarily mean there is no price -- at least not in my view, at all. You are talking about an overall market situation in which there would be a price, You are simply not putting in what, in straight laissez faire economic terms, would be an artificial element.

MR. LACY: I am puzzled by your "artificial".

I could see where you would buy the artifac, consisting of tape, which can be made for about $50.00, let's say.

Do you think it is an "artificial" element if one charges $10,000 for that tape because he has invested a half-a-million dollars in producing the material that goes on it?

Is that an artificial price?

MR. HENRY: I think, Mr. Lacy, you have to keep points of reference in mind, here.

I think I am saying "artificial", relative to an idealized free market economy.

MR. LACY: I don't see a copyright as interfering

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with the free market economy. It just establishes the title of what is offered for sale in the free market economy.

MR. HENRY: When, in effect, you are giving an exclusive right to a distributor for a specified period of time to distribute a title and, supposedly, with that title, an idea, or some computer program report, in other words, that creates a different situation than other kinds of products in the economy.

For example, people who sell vegetables. You know, I have an exclusive license to sell carrots. You don't have that. This is why it is different.

I am not saying that it is a bad policy for that, because the intellectual materials are different from carrots, but this is the point I am trying to get across.

MR. LACY: The problem is what you are selling when you sell a computer program. When you are selling a carrot all you are selling is the physical object -- the thing that you pick up in your hand and weigh.

MR. HENRY: That is a good point!

MR. LACY: When you are selling an intellectual product, it may be involved in any one of a hundred different kinds of packages, tapes, discs, printed pages, whatever. You are not <u>really</u> selling a package, any more than you are selling the bag in which the carrots

are wrapped.

MR. HENRY: Well, you could make that argument.

MR. LACY: That is not making an argument. It is simply a statement of the fact.

MR. HENRY: Well, you could also take another statement of fact and simply say that when you are selling books on a book shelf, copyright as a policy, applies to the book rather than the notions expressed in that book.

MR. LACY: Expressed in the intellectual content of the book.

MR. HENRY: I don't know about the legal positions, but I think there are two reasonably different views on that.

What seems to be said in one aspect of it is that you don't have the right to take this book and photocopy it. You don't have the right to take this computer program and copy it because copyright prevents you from doing so.

Some people are saying that what you are really doing is stealing something. You are stealing a creation, as opposed to just a physical product. It is a computer program likened to a carrot.

The reason for this, obviously, is because the traditional forms of printing technology have changed.

Copyright was predicated on someone controlling the means of production; a very expensive printing press. Now, every man -- to use another argument -- is a publisher.

MR. LACY: No. I don't think that is so.

MR. HENRY: That has changed the whole ball game.

MR. LACY: I don't think that is true. It applied to hand written play scripts that would be produced, dramatically, on the stage; with no printing process being involved at all. You are protecting the playwright's work.

MR. HENRY: I am not talking about playwrights at all. I am saying the technology has changed.

MR. LACY: It doesn't have to be involved at all, because you are not selling a physical commodity at all, if you go to a play that is produced and, in shorthand, take down the words that are said, and then produce the same play, later. You are not buying any physical product at all, but you are certainly doing something, of course, that they would make you pay for if you subsequently performed the work.

MR. HENRY: That is, perhaps, true.

MR. LACY: It is true!

MR. LEVINE: Do you think, Mr. Henry, that the fact that computer programs may now be copyrightable has had any effect on the price of the computer program?

We know, for example, with sound recordings, that unauthorized sound recordings are being sold at a lower price than the authorized.

MR. HENRY: Yes.

MR. LEVINE: Is there any effect now?

MR. HENRY: Well, at this point, my impression is that if there is an effect, it is very negligible, in terms of the actual pricing. I don't know what the reasons for this are. I don't mean to cast copyright as a villain here, saying that if you put a copyright on a computer program, you are going to jack up the price. I don't think that that necessarily follows.

I think it makes it more likely, potentially, depending on what the producers of the program do with the copyright. It is a tool for them to use, if they want to.

In terms of transaction cost, I think you could have some real transaction costs, potentially. This has not happened, for example, in the OSIRIS III case that I mentioned--insofar as I know.

MR. LEVINE: Is the fact that there has been no appreciable effect largely due to the fact that the nature of the protection is --

MS. KARPATKIN: How do we know there is no appreciable effect? How do we know? Is there a study which answers this question?

MR. LEVINE: No. Not that I am aware of.

MR. HENRY: Not that I am aware of.

MS. KARPATKIN: It is certainly not anything that one can speculate about by the seat of one's pants.

MR. HENRY: That is what I am being asked to do.

MS. KARPATKIN: I don't see how you can do it. It might be very difficult to even do a study on it.

MR. HENRY: It could well be.

I hope you understand, this is "seat-of-the-pants" --

MR. LEVINE: I recognize that, because I further recognize that there is no effective way of determining that. But I prefaced it by the analogy to the sound recordings, where, in fact, we knew that sound recordings were being sold at a price lower than the authorized recordings. I don't think there is that kind of data, but the impression one has is that copyright is not the means by which price levels are being maintained but, rather, contracts and trade secrets.

MR. LACY: You can be sure, on the program, because such a tiny proportion are copyrighted that it is impossible for that to have much effect one way or the other.

I would like to come back to one point on the Baker v. Selden analogy. I think it is easy to give that too sweeping a thing. When you are writing a musical score, you are writing a set of directions to a piano player, or a singer, as to what notes he is to sing, or keys on the piano he is to strike, at what intervals, and with what emphasis. One who does not copy this at all, but buys a

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on the stage,
legally licensed copy of it and,/before the public for profit, performs in the way he was instructed to do by that score, h infringed the copyright -- as the Courts have always held. So, whether the performance of a thing in accord with the instructions provided is an exclusive right of the copyright proprietor, I think, depends substantially on the nature of the work and what the performance is.

If it is the kind of work in which the real intention is to disseminate it by selling copies -- such as a cookbook or an accounting manual -- which is involved in Baker v. Seldon -- you have a different kind of law from a work whose specific intention, and whose one social value, is to tell you how to do something, like a musical score, or the script of a play which has relatively little value as a literary work compared to its value as a set of instructions to actors, as to what to do on the stage.

So that here is a possibility of a performance right for copyrighted work which is quite distinct from the right to copy it.

I don't think Baker v. Selden necessarily precludes the existence of a performance right in computer programs any more than it does in musical scores or dramas.

MR. WEDGEWORTH: I think I would rather see us go on.

JUDGE FULD: Yes. I think we might ask further

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questions at the conclusion of the next speaker.

Thank you, Mr. Henry.

MR. HENRY: Thank you.

MR. FULD: Our next speaker is Ms. Susan H. Nycum, an attorney associated with a San Francisco law firm. In addition to her legal experience, Ms. Nycum has spent ten years as a computer operations manager; she has been a Council Member of a Standing Committee on Legal Issues of the Association for Computing Machinery; a Council Member of the American Bar Association Section on Science and Technology; a Director of the Computer Law Association.

She is one of two authors of that report on Computer Abuse published by the National Science Foundation.

Ms. Nycum, welcome.

MS. NYCUM: Thank you.

STATEMENT OF SUSAN H. NYCUM, ATTORNEY

SAN FRANCISCO, CALIFORNIA

MS. NYCUM: It is a great pleasure for me to be here with all of you. I have actually been asked to give two presentations, because Mr. Bigelow is not here.

I wonder if Mr. Bigelow's remarks at this time might flow more normally in the course of the morning.

JUDGE FULD: He has been prevented from coming in because of his illness, I understand.

MS. NYCUM: There has been a death in his family,

and the funeral is today. He gives his apologies and regrets.

JUDGE FULD: Do you want to read his statement first? Is that it?

MS. NYCUM: I think that may be more reasonable.

JUDGE FULD: If you think so, go right ahead.

MS. NYCUM: I guess, since this is Mr. Bigelow's presentation, it would be reasonable for you to introduce Mr. Bigelow rather than myself.

JUDGE FULD: Why don't you describe him?

MS. NYCUM: 6 feet 2-1/2!

JUDGE FULD: That is enough!

(Laughter)

MS. NYCUM: Actually, there is a "bio" on Mr. Bigelow which I gave to someone else.

I might use that as reference material.

JUDGE FULD: I will read it. It is rather long.

He is a practicing attorney in Boston. He is interested in the legal problems of the computer industry. He is Vice President of the Computer Law Association; former Member of the Council of the American Bar Association Section on Science and Technology. He was the first Chairman of the Boston Bar Association Committee on Law and Science and Technology. He is a Member of the Association of Computing Machinery; served as first Chairman

of the Special Interest Group on Computers in Society in 1969 and 1970; served as ACM National Lecturer. He has also been Director of the Boston Chapter of the Data Processing Management Association; Fellow of the British Computer Society; also a member of the IEEE Computer Society, the Society for Management Information Systems.

I gather he is an expert in the field!

MR. PERLE: When does he work?

JUDGE FULD: He has written a number of books.

MR. NYCUM: Yes.

This is Mr. Bigelow's presentation:

The first consideration is: Where does software fit in the computer industry?

He characterizes it somewhat like Mr. Henry; and in some sense, a little differently.

Software developed by (1) manufacturers, primarily operating systems, which he here described as those programs which make the machines work.

Secondly, new product application programs.

An example that comes to mind would be in the electronic transfer system application, which is a relatively new one and, in many cases, is manufactured by manufacturers of hardware.

(2) Users for their own use and for possible sale or license to others.

An example of that is the SPSS, given earlier by Mr. Wedgeworth of such a situation; and by software house as a product of their business.

The EDP Industry Report of March 26 of this year published by International Data said that EDP users would spend $30 billion this year -- 40% on hardware; 33% on salaries; 8-1/2% on data communications; 11-1/2% on outside services; 4% on supplies; and 3% on software from outside sources.

Now, if you consider that the software costs of manufacture are somewhere between the 3% that IBM admitted when unbundled, and the 50% found by the Court to be a reasonable value in the case of the Universal Computer Association versus the District of Columbia, at 3 CLSR 359, affirmed at 3 CLSR 549, a property case; and if you consider that the user's in-house expenditure is a considerable portion of that 33% allocated to salaries, then software purchases are projected by the Industry Report at $605 million -- which, incidentally, is an increase of 33% over 1975; and 250% over 1973. If we take that 10% of the hardware cost, which is $1.2 billion, and then 10% of salaries, which would be $1 billion--both of which Mr. Bigelow feels are probably conservative--and add in the outside purchases, we find that users will be paying almost $3 billion for software in 1976.

The next consideration is: What kind of software needs protection?

First, a study by Richard I. Miller of Harbridge House entitled: Legal Aspects of Technology Utilization, published by Lexington Books in 1974. This was made with the assistance of the Association for Data Processing Service Organizations. The ADAPSO members felt that there were two kinds of software that needed most protection:

(1) Business and financial applications. A survey indicated that 26% of the respondents felt that the protection there had some significance; 42% felt it had great significance; and

(2) Systems software, where 62% reported it had great significance, and 16% thought there was no significance at all; and no one indicated "some" significance.

Here, it is important to realize that most systems of software are provided by the manufacturer or the vendor of the hardware;; therefore, in many senses, can be considered by a software producer to be given away, although, practically speaking, that is not the case. And, also, that in not every instance is an operating system which will do the job supplied by the manufacturer. Not in Mr. Bigelow's remarks, but in my own experience, I know of two times when a major vendor was not interested in the systems software which would do the job, and it had to be developed by the

user himself.

So those are the two types of software that Bigelow feels need protection.

Mr. Bigelow considers the advantages and the disadvantages of patenting and, under that category of Patent, it lists the concern as to:

(1) The cost of obtaining the patent on the part of the owner; and

(2) The political and policy considerations of the monopoly of 17 years once, and if, said patent is issued.

(3) The enforcibility of patents, and the likelihood that they may be found to be unenforcible, once issued; and the

(4) International software limitations.

By statute, software is not patentable in France, and probably not in Holland. It is probably patentable in Canada. He cites Waldbaum, 3 CLSR 164.

Probably in Germany, where a B & T type case was upheld in 3 CLSR 574.

And yes, in the United Kingdom: Burroughs 4 CLSR 1059.

Consideration under "Copyright" includes the fact that the copyright protects a mode of expression, and only that;

That the cost is minimal;

That it can be expensive and difficult to enforce.

There are questions as to proof of infringement.

There is a matter of fair use.

And there is availability of criminal sanctions which are uniform because it is a Federal situation.

As to trade secrets and common law copyright, Mr. Bigelow considers:

(1) The cost is high;

(2) The enforcement may be expensive but the speed of achieving some sort of protection from the Court may be more certain, and faster, actually.

(3) And the effectiveness may also be more attractive.

However, the trade secrets situation leaves one open to reverse engineering, and it has some impact on the ability of doing business in other States.

MR. PERLE: What is "reverse engineering"?

MS. NYCUM: That is when you buy my product and take it apart to see how it was put together.

That last item, of course, involves some important considerations if you have registered business to do in another State. It is one thing that a business entity might be concerned about.

Secondly, there might be some tax problems when

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you suddenly find another jurisdiction interested in considering what you have as a tangible property over there. They might, from the State point of view, assess a sales tax.

The fourth discussion point is:

What methods are used?

And the I. Miller Study that I referred to earlier showed that 78% of those surveyed used a lease with confidential disclosures; and 65% of these people found that it was very, or completely, effective to do so.

65% used the trade-secret license and, of these, 55% found it very, or completely, effective.

58% used copyright and only 39% of those, or 23% of all respondents, found it to be very, or completely, effective.

Finally, there are two other legal aspects that bear on possible deliberations, here.

(1) Antitrust considerations -- the tie-in sale. Either you can't get the hardware without Program X, or or you can't get Program X without Program Y.

In 1969, the then-Deputy Assistant Attorney General for Anti-Trust, Donald Baker, summarized the tie-in sales problem as follows:

"The implications of this broad tie-in rule for the computer software field are pretty

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"obvious. The common existing practice of providing computer programs on a package basis has not seemed a source of major concern so long as computer programs have only been protected as trade secrets; since successful programs can be largely duplicated by others, a particular program is less apt to be a source of the type of economic power necessary to make it a tying product. (Indeed, most of the complaints to date have been based on the theory that computer programs were the tied product in a hardware-software tie-in.)

"However, all of this will change if software becomes subject to some type of patent or copyright protection. A particular patented program may become indispensable to users in a particular field; it will thereby become a real source of economic power -- and antitrust will have to be vigorously applied to prevent its use as a tying device. The fact that it is patented will at least assist in such enforcement, since the patent will enable a court to presume that the software supplier has the necessary economic power to be guilty of illegal tying."

The final point of "other related aspects" is

in taxes.

The Miller study found that, among data processing firms, the method selected "for protecting computer software is as likely to be governed by a desired characterization of their product for tax purposes, as for safeguarding or transferring technology."

For those of you who are not familiar with what happens to software in the tax arena, it is characterized by the Federal government taxing authorities as an "intangible product", and it must be amortized on a straight line basis unless bundled to hardware--in which case it can be depreciated more quickly.

However, on the State side, where there is interest in property and sales taxes, it is characterized as a "tangible", which fits into the taxing category by the State.

That concludes Mr. Bigelow's remarks. I regret that he could not be with you.

My thanks for permitting me to present them.

JUDGE FULD: Will you convey our thanks to him for letting you deliver them?

MR. WEDGEWORTH: Mr. Chairman, I have a question. I was not sure I caught this: There were two levels of statistical data that you were giving us on the methods by which software has been controlled. I would like

to go over that, briefly.

(1) You were giving us a figure related to the number which used a particular type of method, and then there were some statistics of that class of persons, as to the effectiveness of that particular method.

Could you repeat those for me so I can get them?

MS. NYCUM: Yes. You will find that the first numbers do not add up to 100%.

MR. WEDGEWORTH: That is my concern.

MS. NYCUM: That is what I thought you were getting to.

MR. WEDGEWORTH: Yes.

MS. NYCUM: That is because users surveyed used more than one type of protection.

MR. WEDGEWORTH: Okay. I see.

Was there any complete listing of the total number of different types of protection, in addition to the ones you cited?

MS. NYCUM: I have the support material here. Perhaps we can share it with you. I am not familiar with it -- in detail. It might take a few minutes to find. If you would like to look at it, I think it is on page 58, here.

MS. KARPATKIN: Is that the Miller study?

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MS. NYCUM: Yes.

MS. KARPATKIN: Do we have a copy of that?

MR. WEDGEWORTH: Was that in our documentation?

MR. LEVINE: No. Not for today; but we have it in the office, once we get permission --

MS. KARPATKIN: I would like to have a copy of that.

MR. LEVINE: We don't need permission!

MS. KARPATKIN: Find out what he charges for a copy.

(Laughter)

MR. WEDGEWORTH: Thank you very much.

JUDGE FULD: Will you continue with your own presentation?

MS. NYCUM: I will be glad to, unless there are any questions.

JUDGE FULD: I think we might postpone questions.

MS. NYCUM: Now, on my own behalf, I am pleased to address you. I should say that most of what I am going to be talking about comes from a National Science Foundation-supported study on Computer Abuse.

Essentially: What are the bad things that can happen with the use of computer technology?

In addition, I have been asked to comment on two or three questions that were raised by the Staff of the

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Commission.

Computer abuse is a very difficult area to pinpoint, and we finally defined it in a way that is not a legal definition; it is not a technical definition. It just seems to fit, and it is: All those incidences associated with the use of computers in which a perpetrator did or could have received a gain, and/or a victim did or could have suffered a loss.

We have been studying this area for several years. We have gathered data on 370 cases of reported abuses. We are aware of the work of other researchers in the area, and we could say that it is likely that there may be a thousand cases of reported abuses, known at this time.

It is projected that what we have seen is a tip of an iceberg, and the depth of the iceberg is such that we have looked at 15% of the total size of the problem.

That has to be mere conjecture, because there isn't any really clear way to extrapolate, from what we found, how much there exists that we don't know of, yet.

We found, however, that in the cases that we are aware of, that mis-appropriation of computer software accounts for approximately 10% of the problem.

In terms of dollars, we are talking overall --- since 1958 -- about approximately a $5 million-a-year loss; in the last four years, approximately a $10 million

a year loss.

The problem comes because computer technology is moving very rapidly. It is being applied more and more to sensitive areas in organizations -- both in the public and private sector. And certain of the support functions associated with computer technology have not had the ability to keep pace with this tremendous growth of the technology proper. Those would be security functions; audit functions; management functions; and the like.

With that introduction, I will move into a listing of the types of computer abuses that we have seen. Very broadly, and by categories, I think of them as the asset which is the target of the intentional act. The first one is when the computer itself is the target, or the systems software associated with it.

The second one is when the applications programs or the data stored within the system are the target of abuse.

The third is when the computer itself is a perpetrating device; and

The fourth is the area where a computer may or may not be even involved, but it is used as a symbol-- usually in intimidation, or in deception.

Now, for your purposes, the first category where the computer system is a target may be of minimal interest. I would note, however, two areas:

One: where the computer system has some value apart from hardware,

The second one: When there has been damage done to a computer itself, the integrity of the stored programs and data may well have suffered, because of this disruption to the hardware or the systems software.

So this may be a thrust.

Your main thrust of concern will be in the second category where computer programs and data are the targeted asset and, particularly, where we are talking about thefts of programs of data.

You probably will be interested to know that, as a perpetrating device, a computer is an excellent means to perpetrating a theft of software or data and has, in fact, been used in a couple of cases that I will be telling you about, in a minute.

The fourth category -- the symbol category -- we can disregard for our purposes today.

Of the 10% of perpetrations to computer software, I have noted some in both the criminal and the civil area, and I think you will find that most of them are not reported cases in terms of our familiar library research capabilities, but two of them are available.

The two of them, Hancock v. State and Hancock v. Decker are listed at 1 CLSR 562, and 1 CLSR, 858,

respectively. It is a case of incurring taxes when a person who is a programmer operations person in program work at a company called Texas Instruments stole a print-out from Texas Instruments and approached a customer of Texas Instruments to sell the program to the customer.

He was apprehended and his defense was, "Look, all I was trying to sell was a listing, and the Texas theft statute says that I am pretty much in the clear if I have not stolen anything over $50.00 worth, and this paper, by no stretch of the imagination, cost $50.00."

The Court said, "Not so! The program that it contain is worth $2-1/2 million, conservatively, and you are clearly guilty of grand theft."

He appealed that it was a denial of the writ of habeas corpus; the Court of Appeals reaffirmed the holding of the Court and, in Texas and in certain other States, the value of the paper includes the value of the intellectual property contained on it.

VICE-CHAIRMAN NIMMER: Can you give us the citation?

MS. NYCUM: 1 CLSR 562. I have a copy with me. The appeal is 1 CLSR 858. That is: Computer Law Service Reporter.

The second case: We have some reported information about Ward versus the Superior Court of California, County of Alameda, at 3 CLSR 206, which is a denial of the

Motion to Dismiss.

Mr. Ward had been a programmer at one company. He confessed later and plead guilty to a charge of theft of trade secrets under Section 499(c) of the California Appeal Code and the section on Larceny, generally, when he took a copy of someone else's program from a second computer in which it was stored; caused the program to be sent to his home office's computer machine; printed out a copy of it; and carried that copy to his office.

There was a search warrant issued, for the first time that a computer memory had been the subject of a search, and he was confronted with all of this; he did confess; and he plead guilty.

It is interesting that the Court, in addressing this issue for the first time -- it was apparently the first test of the 499(c) -- held with California, and said mere transaction from Computer A to Computer B would not satisfy even the Larceny Statute in California, or even the Trade Secret Statute. When he caused a copy to be made and then escorted that copy to his office, he fulfilled the requirements of the Statute.

It leaves open, the question of what would have happened if he had merely looked at the listing on a screen, or otherwise simply used the computer program, without causing a copy to be printed out.

That case also gave rise to a Civil suit which is not reported: ISD versus UCC, for unfair competition, which was settled out of Court. Prior to that, the jury had found Mr. Ward's firm guilty of unfair competition.

There are a number of other cases which are unreported, based on on-line thefts such as Mr. Ward's, or the misuse of computer programs by employees who had access thereto and then, subsequently, left the company.

I am informed that, presently in the Federal Court over in Baltimore, there is a trial involving a theft of a program from the Federal Energy Agency. I don't have any details on it, since the people involved are unavailable for comment.

Now, as to the questions that were asked of me: What enforcibility? Based on our research, what do we find?

We find that detection is extremely difficult. You can take a computer program and not leave any traces of that which is there.

MR. PERLE: Enforcibility of what?

MS. NYCUM: Enforcibility, generally, of protection.

MR. PERLE: Under Criminal Statutes?

MS. NYCUM: Under any Statutes.

MS. KARPATKIN: By "enforcibility" do you mean "detection"?

MS. NYCUM: I consider detection to be an important part of enforcibility.

MR. PERLE: What bothers me is that I don't really have a frame of reference as to what you mean by "abuse".

Are you talking about the unlawful taking--theft -- coming into possession, illegally, of something?

Or the mis-use of something which would come into possession lawfully?

MS. NYCUM: You can do both.

MR. PERLE: You are talking only in a criminal sense? You are talking only "Criminal", not 'Civil"?

MS. NYCUM: No! I am also talking about the Civil suits that accompanied the act, which was being categorized as a criminal act; which would be essentially in it; and every example here has been brought on "unfair competition" based on a trade secret type of protection. Right?

There are no patents that have been involved.

There have been no programs involved which were protected by copyright -- or attempted to be protected by copyright.

There has been no mention of the documentation

which may be copyrighted. It is all in this context of "trade secret".

MR. PERLE: And under trade competition.

MS. NYCUM: Yes. Thank you for that question. It helps us back to enforcibility-detection as an essential part of it. This is where we are finding a great difficulty. If we have located 15% of these people, presumably we have not detected 85% of them, and I have to say that, to date, the protection that is taking place has been largely by chance -- some of it fairly amusing.

JUDGE FULD: That would be true, no matter what the protected device was.

MS. NYCUM: That is right! I am now talking about the type of perpetration that goes on and the technical ease in which this appears to be possible, and I consider "technical" not only in the technology sense but, also, in the auditing sense; the management sense; all of these things. It seems to be something that people can get away with fairly easily, at this point that we are now in.

Our security is imperfect, so the opportunities are not provided for in the sense of keeping people out. We have not been able to state that there are any known computer systems which are totally secure. There are none that are impervious, now, to the so-called "fighter" case (inaudible) -- trained people who go in and deliberately, on behalf of

the "good guys" try to act like a "bad guy" would, and they have succeeded. Most do not seem to be impervious to an inventive individual, and it does not necessarily require one to be a sophisticated computer programmer. One of our more engaging thieves -- and we have interviewed numbers of these people -- stated that he was able to get into any time-sharing system in the country. So we wondered what kind of technical know-how he had to have in his brief case. All it was, was the telephone numbers of the front office. He would call up and "con" somebody into giving him all of the information he wanted, and it is rather frightening to see what we call building steel windows, and having paper doors that you can simply walk right into.

However, the future is bright. There is considerable concern with protection and security. Our friends in the Privacy Study with the Protection Commission and elsewhere are putting a great deal of stress, if you will, on the lack of security that is presently available, and I think that there will be a tremendous effort to come up with better methods of protection.

Now, I will focus just a moment -- I was asked to talk about trade secret protection; how good it is.

In this context, I will say that, very briefly, we have found it to be very ragged. Some States have fairly good protection, and we have studied eleven of the

so-called computer-intensive States. Some have very poor protection for this type of an asset. Overall, it looks like there may be a need for a better look at what what trade secret protection is available, or/protection under the Federal Trade Statutes of the various States is available and, possibly, a uniform law needs to be written.

There is an interesting number of other types of sanctions which we don't have time for, but it is my understanding that at least in one case going forward in Los Angeles at this time, a prosecutor is using the theory of forgery to try to convict a perpetrator of a theft of some computer time and services, on the theory that he used someone else's account number and identification number--and that amounts to forgery.

MR. WEDGEWORTH: Is it all right if I ask you a question related to that?

MS. NYCUM: Yes.

MR. WEDGEWORTH: Does your study provide data on whether the first party users or secondary parties dominated in the "unauthorized use"?

For example, in the illustration that you just gave: where an organization or an individual may be licensed to use a particular program, well, in your study, are those the persons who dominate in the number of perpetrators? Or is it a second party, like someone getting unauthorized

access to that individual's license to use the program?

MS. NYCUM: It is usually in the second category.

MR. WEDGEWORTH: Because I think that relates to an even larger category of applications, including the testimony we heard from the New York Times Information Panel.

MS. NYCUM: Well, the last point I was asked to comment on very, very briefly--and it will be brief because I have only one sentence to say for it--is the idea embodied in expression in terms of a software program. My own point of view, and from talking with numbers of people, our feeling is, "No more than with ideas, generally". Period. End of report. Thank you!

JUDGE FULD: Thank you very much.

VICE-CHAIRMAN NIMMER: Just expanding on that last point, then, are you saying that you think that copyright protection for a computer program would not result in a monopoly of the useful idea embodied in the computer program even though it would prohibit reproduction of the particular mode of expression?

MS. NYCUM: Apparently not.

MR. PERLE: Do you think that some law in the nature of the Federal law on unfair competition, as applied to computers, would be an appropriate law for protection, to prevent this sort of theft?

MS. NYCUM: It might help.

One of the things that we are noticing is that a Civil protection is not going to be the sole answer because many times, a perpetrator will be, if you will, supported or funded by an organization which will be fined or otherwise subjected to financial constraints. But it is more than that, necessarily. We have to stop the individual so that somebody says to him, "No. That is wrong."

MR. PERLE: What I am so bothered about is that by using the word "abuse", you have already come to a conclusion. That is a conclusory term. Therefore, something has happened. Somebody's rights somewhere have been violated and, therefore, in some context, you already know that something has happened that is immoral, or unethical, or illegal; and we are in here trying to grope for the mode, or the way, of labeling in advance that type of conduct which is immoral, unethical but, above all, illegal, and giving rise to civil or criminal penalties.

From what you said before, I got the feeling that the enforcement has been done in the Unfair Competition/ Trade Secret area, and there has to be something which is the ideal mode--at this stage of the game--for protection.

MS. NYCUM: I wish I could tell you what that was. It has been going through my mind since 1968, what that

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should be. I would think that, after that amount of time, I would have a better response than to say, "I am not sure."

MR. PERLE: If you were sitting on this side of the table--if you were the Commissioner, and you were charged with answering: "Should software be accorded copyright protection and, if not, what type of protection should software be accorded", could you say anything?

What would you say?

MS. NYCUM: As an individual, I would like to see some kind of protection, because there is a tremendous investment on the part of someone who develops it. But there are several kinds of software. There are those kinds that have lasting utility, and there are those that have a single application--for a short-term utility. I think that it is possible that it will depend -- among other considerations -- on what type of protection ought to be given.

Copyright seems like a very useful approach. It seems to have the better of two worlds. That is, some of the aspects of patents, in the sense that it is one umbrella -- like a statutory protection -- and yet, at the same time, some forms of the good parts of the Trade Secret Law, which is difficult, because it is a State kind of protection; but which allows other people to come up with similar ideas, in a sense, as long as they are not infringing on a particular expression.

So I think that it is quite possible, in the majority of types of programs, that you will be using copyright, providing the opportunity for a person to realize the gain that he should get from the investment of his time and resources; and, at the same time, not shutting off the advancement of technology in a field which is just burgeoning, and has not leveled out, by any means.

JUDGE FULD: Does that answer your question?

MR. PERLE: Yes.

MR. LACY: You spoke of the varying effectiveness and character of protection under the Trade Secret concept in the different States.

Could you make any general statement about the varying degrees to which the States, or the varying requirements the State might have as to the degree of precaution that the proprietor has to take to maintain it as a secret; how limited; at what point his making it available to a number of licensees or users has diluted its secrecy and made it no longer protectible as a trade secret?

MS. NYCUM: There is very little experience with protection of trade secrets of this sort. There isn't a standard in the industry as to what kind of security you ought to invoke in protecting a computer program. I know of, really, only the Ward case, in which the Judge there laid o some standards that he saw at the time, based on the first

impression to him.

He said, "Well, you cannot get in by a list of telephone numbers -- unlisted telephone numbers. You have to have an identification number that is particularly yours and only yours, and you have to have an account number. And this seems to me to be enough protection of that trade secret. It is not open to everybody."

Now, that standard may change, because these people have kept that program in source form - - you know, an irreadable form on the system. It is possible, of course, not only to have a program in object form, which is only machine readable, or he would have equipped it so that the standard of what would be adequate protection would get tougher as time passes.

MR. LACY: Suppose the mode of access is not permitting the people to have an on-line access to the program in a proprietor's computer, but is done in the form of licensing the use of it, and providing the licensee with a tape embodying the program.

How generally could one offer it to licensees, and how much would he have to police whether they did or did not, in fact, confine it to the licensed uses, before you feel he no longer possessed a trade secret?

MS. NYCUM: I don't know the answer to that. It is one that I would like to know.

MR. WEDGEWORTH: I just wanted to ask a new question. As I understand your testimony, it appears that the problem does not lie with the type of protection that you considered--as I looked at all of the possibilities--since you have indicated that the major problem is in determining that some unauthorized use has taken place.

So I would raise the question: Does it really make any difference whether it has copyright protection or not, if the major problem is to determine the unauthorized use?

MS. NYCUM: Well, I may have unintentionally misled you. There is a second consideration. All of these have arisen under a trade secret situation. It is a limited experience but, if the trade secret protection is something that is less than adequate at the present time, it is because of the problem with categories in software and tangibles, and the fact that at least four out of eleven computer-intensive States that we looked at do not have any kind of trade secret protection, as such, in the criminal code, and "use" for their Larceny Statutes or Theft Statutes being the common law definition which insists that you take and carry away the personal property of another with the intention of permanently depriving him of the use thereof, and it makes it necessary to take something away permanently, depriving the owner of the use, and that that something is

tangible.

MR. WEDGEWORTH: Let me see if I understand that. A major difficulty in detection is the extreme variability in the law under which you would prosecute him.

MS. NYCUM: Once you protected the perpetrator, there is a difficulty in the protection, to begin with.

MR. WEDGEWORTH: Yes. I understand.

MS. NYCUM: The next step is finding something that you can use, essentially, against the activity.

MR. WEDGEWORTH: Yes.

MS. NYCUM: And there is the problem with categorization, under the existing non-trade secrets specific Statute.

MR. WEDGEWORTH: It would be the Federal Statute that would improve that. Let's take that one step beyond that. Taking that into consideration, I get the implication that a very limited kind of protection may be appropriate in terms of protecting the investment that has gone into it. For example, it might be possible to, say, limit this protection to five years, with compulsory licensing or something to that effect.

Is that moving in a direction that would be appropriate, in terms of the kind of protection you think might be useful?

MS. NYCUM: I think it depends on the sort of program

you are talking about.

MR. WEDGEWORTH: The reason that I bring up the limitation of time is because we know how fast the whole scene changes. I don't see the kind of activity where you are going back looking at programs that were developed for first generation computer hardware, you know, to develop new programs for. That is the kind of time frame-work that I am looking at.

MS. NYCUM: It has been said, however, there are certain machine-independent programs which will have a useful life considerably longer than other machine-independent programs. So I could not say, flatly, that five years is a good time, for example.

MR. WEDGEWORTH: I understand that. I used that as an illustration to get the concept on the table.

Even though there are people who would say that these machine-independent programs might have an independent life--to look at the activity in terms of the development of the equipment and the development of programming, it is inconsistent with the activity.

Would you not agree?

MS. NYCUM: That is true. I am reminded however, of a conference a couple of months ago of the IEEE --- the Electrical people -- and, there, it was stated that the feeling of some of their state-of-the-art practitioners

was that the curve which has gone expeditiously high is going to level off in terms of computer development generally. Therefore--since you are considering a very long piece of legislation--that you might begin to wonder whether some of these things will be good for a longer time.

MR. DIX: One brief question, in this area, that I think you have not touched on. The question is this: Is there a difficulty in detecting -- I will use the word plagiarism. Suppose you have one program here, and there is another program here that you might suspect may have been derived from the other one.

Doesn't this raise a whole series of intellectual problems whether, in fact, it is like the other one, or is not like the other one?

MS. NYCUM: Yes. I have heard, recently, of a case that is now going on -- and I speak very generally. It was not, certainly, any infringement of any of your rights because my programmer did it from scratch in three weeks time. The proof is very difficult, but that raises a red flag, you know -- a massive software programming job, to have someone else magically develop it in three weeks. So there are a lot of things that can be used. Of course, the one that is used in books is also applicable--where you simply put in an instruction which does nothing--

if it is present in the other's program.

MR. DIX: Then you catch him red handed!

MS. NYCUM: It is an evidentiary problem.

VICE-CHAIRMAN NIMMER: That is an extreme difficulty.

MR. DIX: But that is different from stealing a can of beans. You catch him with the beans, and you know they are your beans.

MR. LACY: Just a comment on that.

MR. SARBIN: I suggest that the statistics show that we are only catching 15% of the bean stealers!

(Laughter)

MR. LACY: Since the question of whether copyright would be enforcible in this area as a thing to watch, I think perhaps it should be pointed out that it is almost the reverse of the "beans" case. It may be extremely hard -- even impossible -- to detect that a program has been stolen. But it is not nearly as difficult to discover that, having been stolen, it is being used--if it is an extensive program. It is a little bit like stealing a Mona Lisa. You may be able to get it out of the Louvre, but what are you going to do with it once you do it?

You have a really, really major, quarter-of-a million dollar program -- a half-million-dollar or $2 million program -- addressed to solving a particular kind of operation.

It is fairly easy to see who is using it. I don't think you would have too much of a problem there.

One last thing: I think one of the things that has come out of this is that/trade secret and copyright that have been suggested are somewhat alternate methods of protection. The whole thrust of copyright is always that the way you get it is by publishing the work; by making it available; by offering it to the public in general-- and copyright is your reward for so doing it.

The whole thrust of trade secret protection is that you get it only by keeping it a secret.

They are almost diametrically opposite, in the social goals they serve. It is not at all necessarily true that copyright is a restrictive device-- keeping material from the consumers.

MR. PERLE: There is a third mode: unfair competition where it is published.

VICE-CHAIRMAN NIMMER: There is also what is, presently, "common law copyright". Under the new law, there will be the Statutory copyright for unpublished works, where there is not the necessity of even registration.

JUDGE FULD: Which I think is a good place to recess. Thank you both very much.

(Whereupon, at 12:30 o'clock, p.m., the meeting was recessed until 2:00 o'clock, p.m., on the same day.)

- AFTERNOON SESSION -

JUDGE FULD: Good afternoon, gentlemen.

Are you Commissioner Puckorius?

COMMISSIONER PUCORIUS: I am Commissioner Puckorius.

JUDGE FULD: Will you be here with others to address us?

COMMISSIONER PUCKORIUS: Yes. There are others that might be here:

George Dodson, Assistant Commissioner for Automated Data Management Services;

Isaac McKinney, Chief, Procurement Policy Branch, Automated Data Management Services;

Robert Coyer, Director, Office of Management Policy and Planning; and

Ms. Allie B. Latimer, Assistant General Counsel, G.S.A.

JUDGE FULD: Are they going to sit with you at the table?

COMMISSIONER PUCKORIUS: Yes.

STATEMENT OF COMMISSIONER THEODORE PUCKORIUS
GENERAL SERVICES ADMINISTRATION

JUDGE FULD: We are here this afternoon to hear more on the software protection problem, from representatives of the Automated Data and Telecommunications Service.

Commissioner Puckorius is going to address us first.

COMMISSIONER PUCKORIUS: First, I would like to simply define, in a few words, if I might, why ADTS -- Automated Data Telecommunications Services -- is interested in this series of questions.

MR. PERLE: Can you tell us, first, what it is?

COMMISSIONER PUCKORIUS: Yes. ADTS is a service in the General Services Administration charged with the management of ADP and Communications within the government. We are the procurement arm of the Federal Government for ADP and related services, which we accomplish either through actions ourselves, or through delegations to the agencies involved.

The series of programs that exist call for procurement, reutilization of equipment, software exchange -- that is to say, utilization of software that exists in government today to make it available to other agencies in the government.

Budgeted dollars in this area, as you know, for ADP -- in the Federal Government for 1977, $3.95 billion -- are for procurements that we make, or the procurements that we authorize to other Agencies, and should approach $800 million this year. So it is a substantial business.

I would also like to add that, on the other side of the house, we are responsible for the Federal Telecommunications System -- sometimes called "free telephone

service". There has been a substantial wedding of Communications in the ADP activities in the government, particularly as we go more and more into computer systems that call for communications between central and remote terminal operations.

For your information, the budget for Communications for this year, in the Federal Government, for the control of ADPS is $329 million. So we have a billion dollar operation plus, here, it deals with communications; computers and what runs computers; and software programs.

MR. CARY: Does the original figure that you gave for your ADP operation include software as well as hardware?

COMMISSIONER PUCKORIUS: Yes, that is correct.

MR. CARY: Thank you.

COMMISSIONER PUCKORIUS: I don't know how you would like to conduct this session today. I hope it is just very informally. I have a series of questions that have been put to us. I would like to respond to those questions and have your reaction to the responses, and then have some dialogue.

Would that be acceptable to you, sir?

JUDGE FULD: Surely. You proceed, and we will determine our actions accordingly.

COMMISSIONER PUCKORIUS: The basic, or first

question put to us is:

Should a computer program be copyrightable? Patentable? Or both?

Our position is that the computer programs should be copyrightable, but we do not feel they should be patentable.

We believe the criteria for patentability is too difficult to establish with software.

The second portion: Should the type of protection afforded vary according to the nature of the programs?

VICE-CHAIRMAN NIMMER: May I interrupt on that one?

COMMISSIONER PUCKORIUS: Please do.

VICE-CHAIRMAN NIMMER: Your answer seems to assume that there should be protectability, and it only goes to the nature of the protectability?

COMMISSIONER PUCKORIUS: That is correct. We believe there should be protectability.

VICE-CHAIRMAN NIMMER: Can you expand on that -- why there should be protectability of any kind -- unless you are going to do so later?

COMMISSIONER PUCKORIUS: Well, we believe that the inherent nature of the software is: an intrinsic asset or value that drives equipment, and drives the applications to be used on the equipment -- the intelligence, if you will, of information systems. I think they are created

so that performance can be accomplished.

We believe they should be protected because they show creativity and they have a value.

VICE-CHAIRMAN NIMMER: Should everything of value be protected by law?

COMMISSIONER PUCKORIUS: Well, I could say that everything of value is protected, in that if you steal it, it is illegal.

MS. KARPATKIN: How about the briefs prepared by government attorneys?

COMMISSIONER PUCKORIUS: I sometimes question whether that is creative or not -- or valuable. That is being facetious--I don't have an opinion on that.

MR. DODSON: I assume you mean Freedom of Information -- Freedom of Public Information?

MS. KARPATKIN: Well, they are filed in Court. Anyone can copy them, or use the information contained therein, without copying it directly. But they are creative--and they are of value.

VICE-CHAIRMAN NIMMER: More basically, it is a legal conclusion that something is "property", and "property" is not necessarily everything that is of value. Fresh air is of great value, but it is no one's property. One would have to go back to extremes.

The point is: There is a secondary consideration

besides value before you start to put the fence and property around it.

COMMISSIONER PUCKORIUS: Yes, I guess that is correct.

MR. DODSON: I would be glad to argue with you on the fresh air one, if you add some value to it other than the God-given right, such as the air reduction business. If you create liquid oxygen, or liquid nitrogen out of air, with the added value, you do have a copyright that is protectable.

VICE CHAIRMAN NIMMER: Well, ideas are not property, right? By virtue of the First Amendment, if for no other reason - - but the idea as such -- the abstract idea -- no one can have a property right on that, for social reasons that seem to be good and sufficient as to why people should not be able to have a property right on abstract ideas.

I am trying to get at the social reasons. You may well be right; that they should be protected, but I would not simply assume that.

COMMISSIONER PUCKORIUS: Let's back off for just a moment, if we might, and talk about what we are creating.

First, there is the legal brief, which--I think-- is an excellent point that we could argue on.

The concept of software -- which we are addressing here -- is a series of decision logic, if you will, which creates a program that can drive many different kinds of applications. Its use can be substantial, and it can be used over and over again.

I find that different than a brief which may be a precedent-setting thing, but it is not used every day in some kind of application, and the value -- as I see value in this particular case -- is that if it isn't there, someone is going to have to generate another vehicle to accomplish his task and that is value, in terms of cost, to generate it over and over again.

That is why I say if it is value--if someone created it so that it can be used--we think it should be protected.

MR. MC KINNEY: The computer program, or the software, really represents a man's ideas that he has taken and has put into a specific logic. It, indeed, is a product of his efforts; and when the finished product is completed, it is a product of his efforts.

When you get into software, it is quite expensive, and without some protection, there is concern that the necessary human resources would not be devoted to the development of software, in the absence of some kind of protection against the product that he is creating.

MS. KARPATKIN: Is there evidence to support that last proposition?

MR. DODSON: At least on the commercial market, there is.

MS. KARPATKIN: Yes. Well, taking the situation as we find it today, can we reason backwards and say, because this has been a growing and expanding industry, we have to assume that the quantity and quality of protection today is satisfactory?

MR. DODSON: Let me respond to that, in part because it really has not grown as predicted.

If you go back to your commercial, general purpose, software market five years ago, everyone was gearing up to produce massive quantities of this to replace the manufacturers' software, if you would, and go into business. It simply has not occurred. That is one of the big disappointments. For one reason or another, protection may be an element of it, independent corporate firms went into business and out of business very rapidly in the last three or four years.

MR. SARBIN: Well, many things happened in the last three or four years that were unanticipated. Certainly, one would have to attribute some of that to outside influence. At the same time, we have not heard anything from anyone here about the computer industry as a whole --

software or hardware -- that was different. The word "burgeoning" was used several times -- "burgeoning industr

Growth figures for the industry certainly would support what Ms. Karpatkin is saying. There has been tremendous growth.

MR. MC KINNEY: Granted, there has been tremendous growth but, in dealing with the marketplace, they are now relying on trade secrets to protect those rights. Some of them have fixed copyright labels, and are relying on that. Some of them have used a combination of the two.

If the "trade secrets" breaks down, then they have the copyright protection behind it.

Indeed, this protection is there, and in the licensing agreement, they get quite adamant on the restrictions on use.

So, indeed, there is protection, and I think this has been one of the contributing factors that has caused the investment in the growth.

There is protection now.

COMMISSIONER PUCKORIUS: I think the question that is being raised here is: You question our proposition that they are being copyrighted.

We say that because, from our experience, we find that there is a need for some kind of protection, whether it is trade secrets, copyright, or what-have-you. We believe

that there is a need for that kind of support to permit the industry to continue to invest in the development of new vehicles for sale.

MS. KARPATKIN: Could you develop, a little, why it is that the General Services Administration has such an interest in the industry?

COMMISSIONER PUCKORIUS: Because we procure over $6 million worth, a year, of this kind of product, and we are working diligently in establishing what we consider is the government's right to software which is both equitable to the government, and equitable to the vendors and suppliers. In fact, we now have established a standard Solicitation Document, which deals specifically with the government's right to computer software.

MR. DODSON: Without the software, of which -- Commissioner Puckorius is right -- $6 million last year was the charge for general purpose software supplies to the government. Some of that was the unbundling of manufacturers' software as opposed to independent vendors.

The $3 billion remark he addressed earlier would have no purpose for existing. The function served would be futile -- it would not exist without the software that is essential to it.

I think the overall interest in causing software to be developed -- as Mr. McKinney said -- is the vital

part of automation. Without it being developed, your automation will not exist.

MS. KARPATKIN: Is the best way: for it to be developed by outside manufacturers rather than by the government?

COMMISSIONER PUCKORIUS: I don't think you can answer that question with an across-the-board "yes" or "no". I think we have to look at specific instances, and, indeed, we do. When we award contracts for specially designed software to satisfy specific government requirements, we call for the unlimited right, use, and title to that software.

If, however, a contractor, under his normal mode of operations, is providing other services, such as data base management, computational tele-processing services, and uses his own proprietary package to provide that service -- which is reflected, perhaps, in his economical cost to us -- that software is his, and not ours.

MR. WEDGEWORTH: Mr. Chairman?

JUDGE FULD: Yes, Mr. Wedgeworth.

MR. WEDGEWORTH: Let me ask:In terms of the scope of your responsibilities for ADP , what benefits would derive -- would be derived -- by your agency by the application of copyright to this office?

MR. MC KINNEY: Well, right now, we are faced with a dilemma every time we go to industry to contract for

software and for the design and development.

If, indeed, we had a standard industry practice, we would be in a better position to negotiate with industry on a common basis. And that is one of the things that we are looking for--if we can come up with a mechanism that industry will use to protect. It puts us in a position to know what we are facing when we go to the marketplace.

MR. WEDGEWORTH: I don't understand that.

MR. MC KINNEY: Well, a copyright, or a work that is copyrightable and is copyrighted; along with that, we would assume that certain rights would accrue to the man who leases that. There would be certain restrictions, and we would know what they are.

Now, we rely on trade secrets, and there is a different body of rules governing the protection of material covered by that.

MR. WEDGEWORTH: You are speaking of your agency as a consumer of software?

MR. MC KINNEY: As a procurement agent. And what we are trying to do is to obtain for the government the rights to use software, and our concern, primarily, is with use of proprietary packages. When you get into those that are specially designed and developed, then this is another body. There, we are talking about additional rights and titles.

MR. WEDGEWORTH: Let me see if I can boil this down

more to my level of understanding.

You are saying that, if there were standard industry practice which provided certain kinds of protection, then it would be easier for you to get a clearcut exemption from that?

COMMISSIONER PUCKORIUS: No! Let me say it to you this way:

In the real-life world that we have in the government today, there is a very broad marketplace for the software industry. If we could establish a set of standards that says: GSA--not as a consumer but as a procurer for the government--could procure this software package with unlimited right for use throughout the government. That would be one criteria which could be very simply understood by the vending world, and they would price it with that understanding.

MR. WEDGEWORTH: Which is an exemption from some other kinds --

COMMISSIONER PUCKORIUS: Let me say, "perhaps, yes". Versus what happens today, it is a gray world. How does a software firm know that we procure their proprietary software package? It does not universally become information throughout the government. He might want to sell it. I am using this just as a pure example, now: A package for $20,000 a copy. We could use a thousand copies within

the government. Now, we are not going to pay 1,000 times $20,000. But he thinks that is his market price.

What protection does he have if he sells us one copy and we cannot use it universally throughout the government? That is the problem you are faced with.

MR. MC KINNEY: As the conditions now stand, when we contract for software, we address specific limitations in each and every agreement, and they differ from manufacturer to manufacturer; from product to product.

MS. KARPATKIN: What is the matter with that?

Isn't that the free enterprise system -- mixed marketplace?

Why is that bad?

MR. DODSON: It is not bad; but it is recognizing a property right and our procurement costs for the government -- I would like to go to your question earlier -- are diminished by the fact that a commercial market exists and, therefore, when these people plan to create -- do their marketing planning -- they include both the commercial and the government market.

I don't know what their protection is on the commercial side. I suspect that since the government has morals, we are more likely to honor our contracts, not to frivolously copy, reproduce, and disseminate, in violation of our agreement.

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I don't know what happens in the commercial marketplace, but we urgently need protection in the commercial marketplace for their property right, so that they will make that investment for that purpose.

We would like to, only, pay our pro rata share of the development.

You asked an earlier question. You inferred: Why doesn't the government just develop it for itself?

In a high technology area, where a commercial market has developed, it is the general policy -- and we can go behind that, if you like -- to rely on the commercial marketplace, rather than the government, doing the development.

MS. KARPATKIN: Don't you have any of your own programs?

MR. DODSON: The program is based in the general policy.

MS. KARPATKIN: Does the government write any of its own programs?

COMMISSIONER PUCKORIUS: Substantial numbers! But they are, usually, not general purpose software. They have unique, functional applications: payroll, logistics applications; scientific applications; going-to-the-moon applications.

In the figures that were being quoted, for example, the government bought analyst-programmer services,

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the purpose of which was to write software to the tune of $2 million, last year . These were to write unique functional applications packages.

MR. LACY: Do I understand something you said earlier: that you would like to be able to buy the right from a contractor to make an unlimited use throughout all installations of the government, of a computer program, recognizing the price for that would be substantial? But you did not go on to say -- but I thought you were on the point of saying -- that contractors might refuse to do that, today, because they would lose their trade secret protection, and they would not be as willing to give you a blanket government-wide right, even at a high price, as they might be if they felt more confident of their copyright protection?

COMMISSIONER PUCKORIUS: I could say that, yes! The point that I was making, however, at the time, was the question that vendors have today of: what assurance do they get--if we buy one copy--that we won't make it frivolously available across all of government--simply because it is a huge marketplace.

MS. KARPATKIN: What is the answer to that question?

MR. DODSON: We give a contractual assurance.

MS. KARPATKIN: Why isn't that enough of an

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assurance? Isn't the Government's word on a contract sufficient assurance?

MR. DODSON: Let's say that a government employee violates that trust. I am not sure where the rights would follow; whether the employee would be personally responsible. I don't know whether the government would be responsible, if an employee, outside of his normal duties, misappropriated it.

MR. SARBIN: I would like to suggest, Mr. Chairman, that these gentlemen go ahead through their other questions because as I perceive it, when I get to a question like No. 6, I find an interesting relationship between the conversation we are now having and the response to the question.

Moreover, I think we can come back to these questions that have to do with the premise. They do, however, address themselves to some very practical questions: How the copyright notice should be affixed, and so forth, that we have to get to. So may I suggest that we do that?

JUDGE FULD: Yes. Would you follow that suggestion, and continue with the other questions?

COMMISSIONER PUCKORIUS: Well, sticking with Question No. 1 -- because there are a couple of other questions that I would like to answer on this. You ask: What is the length of time that the protection should be

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available, assuming that we are going to have protection?

We believe that the length of time that the copyright should be applicable should be attuned to the technology. There is no need for excessive protection beyond the applications, on obsolete systems.

What that really says is -- I think I may be contradictory later on -- the current copyright laws are, what? Twenty years?

MR. DODSON: We were under the impression --

MR. CARY: Twenty-eight years.

COMMISSIONER PUCKORIUS: We are under the impression that a software system lasts about a system's life and, to us, a system's life is, apparently, about seven, to eight, to ten years.

Is that correct?

MR. DODSON: Yes.

COMMISSIONER PUCKORIUS: It seems to us that that probably is an appropriate length of time, because what they were designed to run is changed. The technology has changed over the years.

MR. DIX: Excuse me. When you say a "system's life", you mean a computer "generation", to use another term?

COMMISSIONER PUCKORIUS: Or an information system's life. Unfortunately, our hardware technology has advanced at a continually accelerating rate. Software

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designs, in terms of the applications systems, are still dragging. We have a very powerful computer still running punch card applications--used only to a small degree in the capabilities of the new scale computers.

That is a problem of both long range planning and adequate systems and design.

I think that is outside of the scope of this discussion, but it is definitely a problem.

The second question you raised was: Should the copyright protection of computer software be limited to the right to make and vend copies of the program, or should the right extend to the use of a program to operate a computer in a manner similar to the performance right in a musical or dramatic work?

We believe that protection can, and probably should be, achieved through both copyright and licensing processes. Whether or not better policing of multi-passage and reproduction of software would occur with tougher copyright regulation would ultimately depend upon the terms and conditions of contract between software developer and user. Such terms could just as well be exacted via licensing agreements--or at the time software is sold or leased under a copyright arrangement. However, we don't believe that the copyright process should be considered as the vehicle for controlling use of software.

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Once you establish the fact that there is a copyright, permission to use the copyright--with the laws of copyright, let's not set up a whole new policing operation.

The third question: What constitutes copying of a computer program? Making a new version in similar media? Inputting the program into memory for execution?

We believe that any action involving the use of a software package involves copying. To use it, it must be read into the computer. There are two pieces we have to look at:

One is the documentation side. That would be flow charts, computer listing, what-have-you. That, obviously, is the narrative which we would refer to in terms of copyright protection. But the uniqueness of software is that, once that is punched in the cards, or transmitted in some technique into the memory of the computer, it may be in another format. But it is still the same document, and we believe that should be copyrighted and protected.

And we believe that if one computer was to feed the information from Computer X to Computer Y, that is copying that program.

Any use of written narrative, or the machine processible cards, tapes, and so on, we consider the program as software, and, if you are going to establish protection, you are going to have to establish protection--

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not only in the written documentation, but how it is used.

MR. CARY: Excuse me. Right there -- is that in conflict with the statement at the end of your second question, where you said that it should not be considered as a vehicle for controlling the use of software?

COMMISSIONER PUCKORIUS: We don't believe you should have a policing vehicle. What we are trying to say is that: whether it be in a book or a program listing, or a resident in the computer, or some computer-readable document, all of that is a part of the software and should be considered as copywritten. To only establish that that is true, or to establish that that is true, we have a recommendation further down that says that we should make some type of an imprint that identifies--to whoever is the operator--the fact that this is a part of a copywritten document.

I guess we have to find another word besides "manuscript". A copywritten product. How is that?

The next question was Question 4:

What type of additional legal protection for software is needed--as distinguished from more effective enforcement of the present law?

Well, of course, we believe it is recognized that the copyright laws were not, originally, written to protect technological innovations such as computer

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software. Explicit legal wording, which considers the unique environment in which software is used, should be developed. We are just using -- what do we call it? A product, a manuscript, or what is it?

An FPR -- Federal Procurement Regulation -- addressing Government Rights in Computer Software has been developed and will be ready for Government-wide review shortly. This regulation attempts to accommodate different industry positions regarding the use of trade secrets and copyrights at the time of contracting with the Government.

We have copies of that section with us, do we not?

MR. MC KINNEY: No. The FPR staff has made arrangements toprovide the Commission with copies of that as soon as it is available. Mr. Walker.

JUDGE FULD: Thank you.

COMMISSIONER PUCKORIUS: The fifth question is: How can additional protection for software be granted in such a way that it does not lead to a monopolization of the basic ideas and structure upon which the particular program is based?

We believe that the existing trade secret and copyright processes are generally adequate.

There is an additional sentence I would like to make. It is not the one I have here.

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We feel that the process is adequate. We did talk about some better definitions. There is another sentence that I want to add later. I don't have it with me right now.

Bob?

Robert Coyer, my Director of the Office of Management Policy and Planning.

MR. COYER: The meaning of the second sentence, I think, is that if there are any additional provisions or deviations that need to be culled out, they can probably be handled in the contractual arrangement made by the Software Director.

MR. PERLE: What do you mean by that?

MR. SARBIN: What do you mean by "culled out?"

MR. COYER: Any uses -- special restrictions on the use of the software which the vendor may feel give him added protection, which he, perhaps, has discovered in the course of vending his software -- perhaps he has discovered ways of violating the copyright or trade secret laws, within the meaning of the law. He may want to build-in some sort of caveat into his contract.

What we are saying, here, is that we think, possibly, at the contract time, if the vendor has some special caveats, they can be negotiated,

COMMISSIONER PUCKORIUS: --And should not be any part

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of copyright protection.

MR. DIX: Do I understand that you gentlemen are saying, then, that this Commission could make no recommendation for a change in the copyright law -- some future revision of the copyright law -- as it affects computer software?

COMMISSIONER PUCKORIUS: No. I think that we said, in the sentence before that, that we need some better explicit legal wording which considers the uniqueness of the software environment.

MR. DIX: But you say that "Existing trade secret and copyright processes are adequate".

COMMISSIONER PUCKORIUS: In terms of the scope and the breadth, we don't feel there have to be any more restrictive copyright laws.

Is that not correct?

Is that the consensus of opinion -- that it need be no more restrictive. It just should be more definitive.

VICE-CHAIRMAN NIMMER: Well, if I may focus on the other side of the coin--on that question:

What he is getting at is: If you are licensed to have a given computer program, you know the nature of that program.

Now, suppose you want to accomplish the same results that that program accomplishes -- this is difficult

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to articulate -- but using the same abstract idea of the program, but filling in your own specific steps -- not copying the steps from the program that you had been licensed.

Is it possible for you to do that without -- in other words, merely copying the idea and not copying what the copyright owner calls the expression of the idea?

Is that physically possible to do?

That is important -- that the idea not be monopolized.

MR. DODSON: It has not become a legal or a contractual issue with us.

VICE-CHAIRMAN NIMMER: I am not talking about it from a legal standpoint.

MR. DODSON: No. I am saying it has not been so; based on the record, there is no problem.

There is a concept in the use of computers and computer programs called "flow charting" -- Automated Flow Charting. Some of the more profitable -- one or two more profitable -- software packages on the market are some form of an automated flow chart.

The basic concept of flow-charting out, diagramming for visual consumption in a computer program, is the nut of the idea. How you go about it -- there are two or three approaches. We, by the way, contract for several different

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types of flow charters--and have developed, within the government, other flow charters -- all on the same basic concept of thought process. The same product.

Nobody in the commercial market has ever questioned the government's right to design and prepare its own flow charts, except in the area of commercial use. As a general policy, you should not be doing that. But they have not questioned how it is done, or why we do it.

COMMISSIONER PUCKORIUS: You are touching on what I think is the real difference in this copyright area, in that the idea -- there is no monopoly on the idea, as far as I have ever seen in this position as Commissioner, and ten years of consulting work as a Management Systems Consultant. The idea may be implemented with a whole series of algorithms, for instance, but the idea of a production control system -- a new technique -- once that new technique has been seen by other people in the industry, it is copied, somehow. It is altered, perhaps; and you don't use that program that has been designed, that may have taken 100,000 man hours to develop, the next man can probably do it in 60,000 hours, because he has your idea -- but not that particular product. You are not monopolizing any ideas, I don't believe.

Yes, sir.

MR. LEVINE: My understanding, earlier, from Mr.

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McKinney, was the reason GSA was suggesting copyright protection was so there would be a uniformity of the protection, so that the government could deal with each software house.

COMMISSIONER PUCKORIUS: Or simplicity in the whole procurement process. If you are in the contracting process, that is correct.

MR. LEVINE: You are saying -- my thought was -- that, therefore, what you are recommending to the Commission is that we recognize copyright protection for computer software, and you are suggesting that copyright preempt any other forms of protection, because if the other forms of protection continued to exist, then you are still in the same boat that you were when you came in, this afternoon. But this question seems to suggest that you are saying that you have explicit copyright protection and continued trade secret protection and contractual types of protection.

MR. COYER: One thing we found is that the industry is our best policeman, in a lot of ways--in terms of any possible violations of procurement regulations, as well as things like this. I think if they discover end runs of some sort, or new ways to bypass, let's say, a copyright -- still keeping within the order of the law -- they will let us know about them.

I think there is a particular twist that has

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/? been introduced by some user of the South Berwick, which seems to violate the copyright law. They called it to our attention and it may be necessary to acknowledge that this is a frequently, or surreptiously-managed violation of their right, and we can build that into the negotiated contract.

MR. LEVINE: My question is: Should trade secret protection continue to be accorded to computer programs?

COMMISSIONER PUCKORIUS: Let us caucus here.

(Brief recess)

COMMISSIONER PUCKORIUS: I think I have an answer for you, Mr. Levine.

MR. LEVINE: Thank you.

COMMISSIONER PUCKORIUS: That may make some sense. I think Bob touched on the fact here, for a moment, that we believe the industry itself is the best policeman. The industry is not sure what they would like. It seems to us that we don't believe that copyrighting should be paramount over trade secrets, or even patentability. I might add that we feel that there are cases where we feel that there are cases where copyrighting is a good vehicle; that trade secrets are a good vehicle; even contractual relations are a good vehicle. We are not ready to take a firm position as to one over the other--or to the exclusion of any one, at this time.

It is less a legalistic question than an industry

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position; industry itself finally deciding where it is most comfortable.

MR. DODSON: Let me add to that: We have some conflicting regulations in the government, right now, on the Federal procurement regulations and the Armed Services procurement regulations, on rights in data: rights to computer software.

The industry worked with GSA to develop the clauses that we now use in our uniform procurement document. I think you have been given a copy of that.

The general purpose of the industry did not agree with the Armed Services regulation. It was developed with the cost-type contractors -- the R & D contractors -- who have an entirely different problem than the commercial vendors.

The commercial vendors are now stating that they refuse to do business with the Department of Defense for their systems and involved software--until they can get these rights in data to their commercial product straightened out. It is a very vital issue to us to resolve -- at least with industry -- how they will do business.

I think Mr. McKinney's point -- this is his dilemma -- is some acceptable and uniform vehicle for doing business with industry.

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MR. LEVINE: I understand that, but I think that is somewhat contradictory with your position, after caucus, that all forms of protection should remain in effect.

I can understand from the producer's side that the maximum protection; every route available--fine! From a consumer's standpoint -- which you, as procurers are -- I could understand your wanting sufficient protection to protect the producer so that you can have access to the materials you want, but if there is adequate protection in, say, copyright, then isn't it to your interest that you not be encumbered by other forms of protection, such as trade secrets?

MR. DODSON: Well, let me get to the dilemma that I was facing.

We have the same software product that the vendor is protecting under trade secrets and, at the same time, he has fixed a copyright label on it.

You have both protections on the same package.

VICE-CHAIRMAN NIMMER: Mr. Levine asked: Would you want the trade secret protection, as a matter of law, eliminated, so that you don't have to worry about that, and still have access to the goods.

COMMISSIONER PUCKORIUS: Let him try to identify the protection on that package--not slap two on there and let us figure out which one takes precedence.

VICE-CHAIRMAN NIMMER: Your question is: Why go through that dilemma? Why not pick one, and not the others?

COMMISSIONER PUCKORIUS: What we do is--based on the protection he has specified--we have resorted to specifying in the contract the rights that we get. This goes back to her (Ms. Karpatkin's) question. We have been able to do business with them, even in this.

MR. DODSON: Let me add one more thing.

The trade secret, as far as doing business from an industry point of view, is a very weak vehicle under the Freedom of Information Act, and the Court rule is, on the Freedom of Information Act, that no matter how trade secrets are marked and identified, at least within the government, the employee who has possession of this material has to reach an independent judgment as to whether, indeed, that material constitutes a trade secret. He is held personally responsible for reaching that independent judgement. It is a very indefinite type of protection, so we are in the Federal Courts frequently on whether or not it should be released, or can be released, and then there are the reverse Freedom of Information suits on the types of judgements that are reached.

MR. LEVINE: That is why I am surprised that you did not say, "Yes, copyright alone, -- trade secrets.

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causes more problems than we care to deal with."

COMMISSIONER PUCKORIUS: The answer to your question is that we are not ready to take a firm position.

MR. SARBIN: Does that mean that you really don't want to state it as positively as you do in your answer to Question 2?

COMMISSIONER PUCKORIUS: Well, I question whether I say it more firmly. I say, " * * * probably should be achieved through both copyright and licensing processes."

MR. SARBIN: That is about as affirmative as we ever get, on a work of this subject.

Now you are saying you are not quite so sure about that.

COMMISSIONER PUCKORIUS: I am saying that I believe we have not researched adequately to know what the impact would be if we said, "Our position today is that trade secrets will no longer be accepted in the software area. The only approach would be the copyright approach".

I think that there would be a cascading impact through the industry which may very well turn out to be right in the end, but we are not ready to take that position.

MR. FRASE: Mr. Nimmer, can something be copy-

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righted, and still be a trade secret?

VICE-CHAIRMAN NIMMER: In the unpublished area under existing law it would be common law practice -- not statutory.

MR. FRASE: I am talking about statutory copyright.

VICE-CHAIRMAN NIMMER: But, under the proposed new law, statutory copyright would include statutory protection for unpublished works which are not in the register. So I think it would be considered.

MR. COYER: We are still left with a dilemma which has been proposed by one of your other questions. That has to do with what constitutes "copyright law." I suppose the new law would have to acknowledge the technology in situations where you are reading a program into a memory. As a matter of fact, are you violating a copyright law at that time?

The only way you can use the program is to actually copy it. Receive it.

COMMISSIONER PUCKORIUS: I think we addressed that in more specific language required in this environment.

MR. COYER: It is that sort of thing that puts us in this dilemma and forces us to say, later on, that new language is necessary to take care of this unusual technology.

JUDGE FULD: Go ahead, Commissioner, with the other

questions.

COMMISSIONER PUCKORIUS: Okay.

The next question is Question No. 6:

Would stronger copyright protection for software encourage increased sale of proprietary software products, and less reliance on restrictive licensing arrangements based on trade secrecy, now common in the software marketplace?

We cannot give you a "Yes" or a "No". We believe it depends on the industry's cost-payback analysis, marketing plan, and contractual arrangements made with the client.

The environment is substantially different, depending on what the deal is, so to speak.

Generally, though, I would assume that, if we could zero in and say we are going to stick with copyright protection -- that is the main thrust of the protection -- and it was understood and agreed to by industry -- which is a big problem -- I think there would be an opening up of the sale. It is a question of--once it is understood: would it be used? I think that is the problem.

MR. PERLE: When you contract out--when you have somebody develop a program for you--you are paying for it.

Do you pay more if you are going to use it

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throughout the government than if you are going to use it just in one area?

The program does not exist except in your Commission, in effect?

COMMISSIONER PUCKORIUS: Philosophically, the answer should be that there would be no difference. Philosophically, the answer should be, "No difference".

MR. PERLE: Have you had experience in this area?

MR. DODSON: You have procurement going on right now for that Cobalt Diagnostic Program.

COMMISSIONER PUCKORIUS: We have acquired very few packages to be developed -- general purpose packages to be developed. My feeling -- and, really, I am going to refer to one we acquired about four years ago -- was that the only breakpoint that you got in cost was whether you got only government rights--or you got total rights.

Did you leave the producing vendor with commercial rights after it was over?

That question arises.

Who has commercial rights, or total rights, versus the government?

To the extent of the development itself -- I draw a line between the development, the distribution, and the maintenance -- just the sheer development -- we will stop at that point -- of the creation, makes no difference.

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Once you go to multi-point, then you go into software maintenance and distribution, and there is additional incremental expense. It makes a difference between whether the government took possession and maintained and distributed, an expense or whether the vendor did; but that is/entirely aside from the development. The point of development only reflects whether you get total rights, or just government rights and leave the commercial rights.

MR. LACY: Which do you, typically, do? Take total rights; or do you leave the vendor with the commercial rights?

COMMISSIONER PUCKORIUS: In my very limited experience, -- I will address this just to that one instance -- we left the commercial rights.

MR. LACY: But you assume that there would be a differential in price? That is, there would be a price reduction if you do not completely recover the initial cost from it?

COMMISSIONER PUCKORIUS: Absolutely!

MR. LACY: If you want a program in some area where you are aware of a need in the government for software to deal with a problem, how do you go about finding out whether that might be commercially available, and whether there might be existing software?

COMMISSIONER PUCKORIUS: Establish the requirement and publish the request for the proposal to include the

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design and development of that particular program. In that process, if someone has a commercially available program to satisfy it, they can come forward and offer it as a part of the published response to the RFP.

Obviously, there is no one central depository or library for available programs, today.

MR. LACY: Not commercially.

COMMISSIONER PUCKORIUS: Not commercially; although the major manufacturers of ADP all have substantial library listings of what is available. We have no Library of Congress that controls all programs. They are not all ready. They are attempting to start that in the government, right now, with an ADP sharing program--which will be run through the Department of Commerce. It has just been established -- where we are going to register, if you will, the software within the government.

MR. LACY: If you develop a program yourself, in-house, in the government, or, alternatively, buy total rights from a vendor to a program, what is your practice-- if private interests want to use the program?

Do you make it available free?

Do you charge just the physical cost of reproducing a tape or a set of punch cards with the program?

MR. DODSON: I think the question has come up, legally or officially: Is a program developed by the

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government, and the government rights and the copying documentation available under the Freedom of Information Act?

My understanding -- and Ms. Latimer back there is our attorney -- is that it has been determined that it is not available under the Freedom of Information Act.

MR. LACY: That is probably the National Library of Medicine case--in which it was determined that "a data base is not a program."

COMMISSIONER PUCKORIUS: I understand that the determination is that it is not available.

MS. LATIMER: Although there are conflicts in the government, some Agencies have, tentatively, taken the other position that they would make a program available.

MR. LACY: Well, NASA for example, under their basic legislation, is supposed to spread technology so, under their basic legislation, they make their technology available. But that is a separate aspect.

MS. LATIMER: Well, we are taking the position that it is a copyrighted program and was not intended to be covered under the Freedom of Information Act.

MR. LACY: Would not the government be willing to sell or lease access to that right?

You know, not claiming its right under the Freedom of Information Act, but just the same way you lease out a

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a piece of real estate.

COMMISSIONER PUCKORIUS: I don't think there is a policy established; that if you would go through the annals of the various agencies of the government, you will find, in some cases, that programs have been made available to educational institutions, and even to commercial institutions that perhaps may support the government in certain areas.

In other cases, there is a great secrecy devolved around the software. So I don't think you have a common approach to how the government reacts.

MR. LACY: There must be a number of programs or things that are common to government and industry, like inventory control; payrolls; fund transfers; and that sort of thing.

COMMISSIONER PUCKORIUS: I would hate to tell you how many payroll systems are currently under design within the government today, and have been for the last twenty years; and we still don't have a standard payroll system within the government!

As a matter of fact, within GSA, we are designing our own (system), and another Branch of our own Service is selling the same system to other Agencies.

JUDGE FULD: Do you want to continue with the other question?

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COMMISSIONER PUCKORIUS: Yes. Thank you.

No. 7: How should the copyright notice be affixed to the software product?

In some human, readable language, on reels, card decks, and in headers of tape, discs, or what-have-you.

I certainly don't think that you could put it on every card in the card deck.

Question No. 8: In what form should registration copies of programs be deposited with the Library of Congress?

Listings? Tapes? Flowcharts? Complete documentation packages?

Our belief is that a better answer could come from the Library of Congress, itself--with input from the National Archives.

By the way, we have had some historical problems in this area. I might touch on one:

You know, they store program tapes and there was no standard established, and low and behold! Over the years, the machines that generated the tapes have become obsolete and discarded, and they cannot even read the tapes in some instances. There is a need for an answer--from both the Library of Congress and from NARS.

Question No. 9: How would the changes which you suggest affect the proprietors and users of software products?

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The Government has always honored and negotiated any limitations imposed by software vendors in the contract process. Beyond existing trade secret or copyright regulations, contractual agreements can accommodate most, if not all, software usage problems such as identification or use.

We see no major change required there.

Those are the nine basic questions that were asked. There were eight very specific questions, and I can quickly go through those so you can have them for the record.

JUDGE FULD: If you will, very briefly.

COMMISSIONER PUCKORIUS: All right.

1. Do you purchase computer programs for federal agency use?

Yes, we do, through schedules contract process.

2. If so, what is the approximate annual volume and cost?

From six to ten million dollars, for general purpose software.

If you are going to talk about specific application in software, up to $200 million, annually.

3. Do we employ a standard purchase contract?

Yes, we do. There is a standard software schedule contract. We would be happy to make it available.

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JUDGE FULD: Please do.

MS. LATIMER: We have copies.

COMMISSIONER PUCKORIUS: What we are giving you is a specific case example, not a model document -- but a specific case example.

Do we distribute federal agency programs outside the federal government?

The GSA does not. No.

If so, in what way and on what terms?

That is not applicable.

Would you see any advantages or disadvantages to the federal government in the strengthening of copyright protection of computer programs?

I guess, as a summary of the first nine questions asked, we say that possibly--by developing legal language which accommodates unique environment in which software is used and differentiates it from works such as musical scores or textbooks. As the computer technology advances, new questions of uniqueness continually emerge, as for example viewing software on remote CRT's, or terminals; software stored on chips, and so forth.

What we are saying is that, as the technology emerges, we are going to be in a slightly fluid state; and if we are going to use unique language, we are probably going to have to change the unique language, or amend the

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unique language. But the general concept of the copyright law would go forward.

Would you see any advantages or disadvantages in new legislative authority for Federal agencies to copyright computer programs?

Beyond what we have now, the answer is "No."

JUDGE FULD: Thank you very much. We appreciate your presence.

COMMISSIONER PUCKORIUS: Thank you.

DISCUSSION ON STAFF PLANNING FOR PHOTOCOPYING RESEARCH STUDIES

JUDGE FULD: We are going right on with the meeting, and will discuss the Staff Planning for Photocopying Research Studies.

Prior to that, Arthur Levine has a couple of announcements.

MR. LEVINE: Just a couple of brief announcements:

The transcripts of the last meeting are available; and if you would like copies, I think the best thing would be for us to send them to you in the mail. Unless someone says he doesn't want them, we will send them to everybody.

We will hand out to you a copy of the material that Ms. Nycum quoted from on the statistics that you asked about. We will pass that out.

We have a copy, in our library, of the final report on Computer Abuse prepared by Ms. Nycum, Don V. Parker and

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S. Steven Wood, and it will conform with your library loan.

MR. LACY: Does that mean that you will xerox a copy for us?

MR. LEVINE: No. I think it is unprofitable to do it. We may prevail on NSF to make additional copies available to us.

MR. WEDGEWORTH: I think it would be helpful for our basic library, if you could provide the Commission with copies that are identical.

MR. LEVINE: I will see if we can get enough copies.

MR. WEDGEWORTH: Who published it?

MR. LEVINE: Stanford Research.

I think we can get enough. We won't have to copy it.

Actually, it has an improper copyright notice, I believe, so perhaps we can copy it with impunity!

(Laughter)

JUDGE FULD: We will now consider the Staff Planning for Photocopying Research Studies. I will merely add, for the Commissioners' benefit, that after we have completed today's agenda, we will have an Executive Session for a short time--after our audience leaves.

(Discussion off the record relative to

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approximate time of adjournment.)

MS. KARPATKIN: For later reference, can you give us the title of the document that starts with: "8. Copy-writing data"?

MR. LEVINE: Yes, I will get it. I will have that for you.

JUDGE FULD: Mr. Levine, do you want to pick up the discussion on Staff Planning?

MR. LEVINE: It is the Miller Study, but I will give you the title.

MS. KARPATKIN: I know. I know it is the Miller Study. I would like the title and the citation for it.

MR. LEVINE: Yes.

What I would like to do is turn this over to Bob Frase who prepared the material that we sent you on the Research and Statistical Studies that we are concerned with contracting out, and have him speak to them, if he will.

MR. FRASE: Both of these are based on the following premise: that no matter how the last details of the Revision Bill are worked out, there will be a substantial amount of photocopying that requires permission, or licensing, or getting authorized copies. A large bulk of it will probably be in for-profit organizations.

Both of these studies are related to that question

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dealing with that problem in filling our Statutory obligations to make recommendations not only on Copyright Legislation but on Copyright Procedures -- of which we are reminded by Senator McClellan's recent letter -- and we hope the Commission will get on this -- of developing methods of licensing.

The ~~study,~~ proposed contract to the University of Indiana Graduate Library School deals with the Publishers' side of this and, particularly, in the area of scholarly, professional, technical, scientific journals, to assess public attitudes: How they would like to go about licensing; or providing authorized copies; or ideas about royalty rates; about kinds of services they might give; whether they would like to do it through authorized agents, or through themselves.

The contract is proposed to this organization because they have a basic list of 2,600 U.S. journals of this kind which they developed and categorized by scientific or technical discipline and, also, whether it is a publication by a society, a commercial publisher, or University Press, or others. They have all of this information on computer tape, so they would be in a much better position to do it quickly, and cheaply than anyone else.

There has just been passed out a letter from them indicating the breakdown of their costs, which you will

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see comes to just under $10,000.

It will cost $10,000 to do this in a period of three months.

The timing of the start of the program would probably be after the final shape of the revision material on photocopying is known -- that is, after the Conference Report. I say that because it will have some influence on the questionnaire and, also, make it a good deal more realistic to the respondents that something is in existence.

And, secondly, because starting then, the responses -- these opinion responses and factual responses -- from the publishers will have no impact on the Bill, itself.

If Publisher X says, "I would like to charge $5. a copy for the authorized reprint", it might have some impact on what the Bill might be because it might be regarded by the other side as an exorbitant price. If this is all done after the Bill is put to bed, then we need have no fears of that kind of impact, and we will get a very much better response.

There is no one here from the contractor -- the proposed contractor -- but I think that, together with the actual draft of the questionnaire which was received in advance -- which is not frozen but still open to amendment -- it will give you the basic information that you need to act on the proposal.

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JUDGE FULD: What is the cost again?

MR. FRASE: $10,000.00.

MR. WEDGEWORTH: By what procedure do you anticipate modifying this questionnaire?

MR. FRASE: Any input for any omission and, also, trying it out. This has already been started in an informal way with a few journal publishers to see whether they think it can be done.

MR. WEDGEWORTH: Is there going to be a formal pre-test by this institute?

MR. FRASE: Probably not formal, no.

MR. WEDGEWORTH: I would suggest that that become a part of the contract.

MS. KARPATKIN: Could you explain that a little more for the benefit of the rest of us?

MR. WEDGEWORTH: Well, it is simply a standard procedure so that you get some verification that the answers that you are intending to elicit from the questions are, indeed, the answers that people are inclined to put down.

For example, I look at several of these questions, and I am not sure what the objective is, and I can see several different questions being asked, and then one question, and the result is that you get back data that you cannot use. And the simple way of handling that is that you

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develop the instrument, and then you test it by having a few people respond to it. Then you analyze those responses to see if that is what you really want.

MS. KARPATKIN: How is that questionnaire developed?

MR. FRASE: I developed it, essentially, and tested it informally with Mike Harris.

Would you have any objection to the pre-test not being part of the contract, but being done informally in advance by the Commission Staff?

MR. WEDGEWORTH: No. I am saying that I think the investigators ought to do this because, if you are contracting the job, it seems to me that this is part of the job. It is their integrity that is going to back the results of the study, not the Commission, you know. They are performing a service for the Commission.

MS. KARPATKIN: This is really just exploratory:

If what Bob says is correct, should not the investigators have a greater input into the questionnaire before the questionnaire is made final and, perhaps, -- and this is a further exploratory question -- should that input come even prior to the pre-test, but come in connection with a review of the questionnaire to see whether it is the best possible questionnaire for the purpose desired, since they have the expertise that we are paying for.

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MR. WEDGEWORTH: I assume that this was for illustration purposes.

Am I correct on that?

Or did you intend this to be the actual questionnaire that they would use?

MR. FRASE: I intended this to be the actual questionnaire, subject to any inputs from the Commission, for an informal pre-test.

So far as the input by the investigators is concerned, you will see that, in this letter which has just been handedout, there is a statement in the third paragraph, the second sentence:

> "We have looked over the draft questionnaire and find that the fourth draft, dated May 20, 1976, already incorporates suggested changes which had occurred to us from the reading of the previous drafts. Other suggested changes may, of course, emerge from the pre-test which I understand you are planning, on closer scrutiny, after a contract award."

MS. KARPATKIN: Where is that sentence?

MR. FRASE: This is the last two sentences of the third paragraph, the first page.

MS. KARPATKIN: They leave the door open for closer scrutiny after the contract award.

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MR. FRASE: That is right.

MR. PERLE: Bob, what sort of rate-of-return do you expect on this?

MR. FRASE: The time it takes, and the time in question -- which are largely opinion -- it should be good. The unanswered question is the political one -- the emotional, the attitudinal one. If it comes after the Conference Committee meets and we are clear as to what we are operating on -- what the future holds -- I think it ought to be pretty good because they then have to deal with the problems of authorized copying.

MR. PERLE: Is there any track record on surveys, and getting responses on this type of thing?

MR. FRASE: Not directly. Frye used the same basic list of 26,000 technical and scientific journals for the second part of his survey of library interaction with journal publishing.

However, his response was quite poor--but what he was asking for was three years of back-counting information in a standard form; and every publisher did it differently--so even those who cooperated and were on the Committee like Wiley -- it took him six months because, you know, he was asking for information that they did not keep in their accounting records as a matter of course.

The kinds of things that are asked for, here, a~~s~~

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are attitudes; prices; would you do it yourself; would you have an agent do it; and so on.

MR. PERLE: What percent return do you have to get to have a statistical basis?

MR. FRASE: Since we are dealing with named titles, I would say it would depend on -- there would be variations of statistical validity within categories, because you might get a better return from University Press than from a commercial publisher. You might get a better return from Science and Chemistry, say, than from the Humanities. It is an attitudinal thing, so I think if you got 50% it would be very helpful in future planning.

MR. WEDGEWORTH: Just to move this along: I would like to strongly support the idea of collecting this data. However, I would say that--in commending the staff for developing this draft of the instrument that will be used--that it is important for this to be reviewed by the investigators themselves, and that they give us their assurance that the information will be clean, by pre-testing it prior to actual data collection.

MR. PERLE: All they are going to do is distribute and calculate?

MR. FRASE: Yes.

MR. PERLE: They are not going to investigate?

MR. FRASE: That is right.

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MR. PERLE: Who is going to do the bouncing back?

MR. FRASE: Oh, yes. They are going to do the follow-up. The procedure would be to send out a post-card with a questionnaire and a package and an explanation, and have that come back as to who is in charge in that publishing house; when they could get it back. There would be a deadline set. If people did not send the stuff in, there would be two follow-ups; one by mail and one by telephone. They would have all of that chasing to do.

MR. WEDGEWORTH: I am not really sure. Who is going to analyze the data if they are just going to distribute and tabulate?

MR. FRASE: We would supply them with the table shelves that they would tabulate the results on.

MR. WEDGEWORTH: That is the tabulation.

Who is going to tell us what it means?

MR. FRASE: The table shelves would be set up to reflect the questions you want answered, and they would do the table shelves; then the Staff would make the report as to what it means.

That job could be given to the contractor, too, but I think that probably we know more about it than they do.

MR. WEDGEWORTH: I guess I really misunderstood the thrust of the project.

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You are really doing an in-house project.

MR. FRASE: The mechanical work is contracted out. That is right.

JUDGE FULD: How do the Members of the Commission feel about it?

Do you want approval for it?

VICE-CHAIRMAN NIMMER: Personally, I am for it--but I am curious. For example, if the tenor of the results are such that it indicates that most publishers are amenable to licensing at reasonable rates of reproduction, then what does that mean for us?

Does that mean on the one hand that, therefore, we should recommend compulsory licensing because, politically, it would be easy to achieve?

Or does it mean, on the other hand, that you don't need a compulsory license because they will do it, regardless of whether they are forced to by law?

MR. FRASE: I think it depends on the spread of the results. I think it would be helpful in answering a consideration of that question.

JUDGE FULD: I wonder if we may consider passing on this -- passing on whether we approve or not.

All those in favor of the presentation?

MS. KARPATKIN: Could we have a motion?

JUDGE FULD: I intended to put it in the form of a

motion.

Those in favor of the project indicate by a show of hands.

MS. KARPATKIN: Which is defined in what document?

JUDGE FULD: The letter from Indiana University.

MR. WEDGEWORTH: Mr. Chairman, as I said earlier, I am in favor of collecting the data and proceeding in this way, but I am afraid that we have not really put together--in a succinct form--what it is we are going to do, and why we are doing it, with the instrument that we are going to use to satisfy that question.

I just don't want to see us move forward because, if you ask me right now, I would have extensive modifications that I would recommend for this instrument. I think it is entirely inappropriate, unless I have a clear idea of exactly where we are going, and that is what I really don't see here in the proposal to do the study.

MR. FRASE: Bob, do you mean what the purpose is?

MR. WEDGEWORTH: Yes.

MR. FRASE: The purpose is to try to get some indication, from this group of journals which we have classified--and which are now in the heavily-copied area--as to the attitudes of publishers about supplying authorized copies, or us doing it directly, or through

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agents setting up their own clearing house, or using somebody else's clearing house, and what they think the royalty rates might be; what the appropriate kinds of service might be; and so on.

MR. WEDGEWORTH: What is the significance of the attitude?

MR. FRASE: This is based on the presumption there is going to have to be an area of authorized photocopying, and that practical methods of dealing with it will have to be developed, and this is one of the Commission's assignments.

These are the people that have the product which will have to be supplied in an authorized fashion.

MR. WEDGEWORTH: Well, that is the reason that I am, really, saying that I would like to see a proposal--because I am not sure that the constraints to moving or not moving in that direction are a matter of attitudes.

MR. FRASE: Well, it is a matter of attitude, and it is also a matter of fact.

MR. WEDGEWORTH: On what would you base that statement?

MR. FRASE: Well, the facts would be -- and some of the questions deal with: Are you willing to make this freely available to anybody?

Are you going to make it free to non-profit

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libraries?

Any kind of a clearing house system has to have some idea as to what the volume of business is, in order to make it work.

MR. WEDGEWORTH: I think you misunderstood my question. You are right about that. To me, the issues that may be involved in considering a clearing house or some kind of a licensing system relate to: what is the extent and nature of the activity to which it will be applied -- a series of questions in that particular area.

My question to you was: What does attitude have to do with this, because attitude cannot change the facts.

VICE-CHAIRMAN NIMMER: May I try this one?

I think it may go partly to this: Assuming there is going to be an area that is not subject to the 108 exemption -- presumably, there is going to be some area that is not subject to the 108 exemption for which payment must be made if photocopies are duplicated.

Right?

As to that area, if you further assume -- as I do -- that it is desirable to have some kind of automatic licensing--that the libraries don't have to get advance permission to reproduce -- then that leaves, I think, only two alternatives:

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(1) A voluntary clearing house ala ASCAP; or

(2) A government- imposed compulsory license.

In evaluating which of those two routes would be preferable, I would suppose it is relevant -- although not necessarily decisive -- the attitude of the publishers toward joining in a voluntary clearing house system.

VICE-CHAIRMAN NIMMER: Where are you disagreeing?

MR. WEDGEWORTH: I am not disagreeing at all! I am just saying I am not sure that I really understand where you are. If I were going to approach the question that you just raised, I am not sure that I would go out and ask anybody his opinion of that in general. I would try to define what the problem is and the factors that are determinative in the problem, and lay those out, and ask some questions that were related to those.

VICE-CHAIRMAN NIMMER: To be more specific, on the clearing house, itself?

MR. WEDGEWORTH: Yes. The attitudes might emerge in their answers to those questions related to the determinative factors. But I don't think it would really be the attitude that would be my primary interest.

MR. APPLEBAUM: By that, do you mean you would not ask the question: "For 2,600 rabbits, how much more lettuce you would like to have?" You would ask the question of 2,600 publishers,"If there were a licensing agreement,

would you consider passing some of the fees on to the individual authors?"

Is that what you mean?

MR. WEDGEWORTH: Yes. That is a question they can respond to. Whether or not they like it -- which I consider is an attitude -- to me, is somewhat irrelevant.

MR. FRASE: As a preference, for example, you could ask, "Would you like to supply reprints yourself?"

"Would you like a cooperative proprietor's clearing house to supply reprints?

"Would you like something like a periodical bank, developed by users, as a method of doing this?"

These are not "attitudes". These are preferences with respect to various ways of going about this.

MR. LEVINE: In addition, there are questions as to what their current practices are.

MR. WEDGEWORTH: I agree with that.

What I am saying is that: If I were to look at this questionnaire as a researcher, I see that you have several different kinds of things mixed up.

One is: What are you currently doing?

That is a very straightforward question to ask.

Do you presently provide a reprint service, or some other kind of authorized reproduction?

Do you do this yourself, or do you make this

available through an agent?

Those are questions about current practices, and then there are questions that could be asked that build upon those questions about current practices that project what they might do under certain circumstances.

What I am objecting to is asking what somebody might do under undefined circumstances. I will give you an example.

No. 6: "Will you be willing to authorize (and to include a printed statement to this effect in each issue) permitting non--profit libraries open to the public to copy articles from all of your journals, current as well as back issues?"

"Under what circumstances?"

It is a question that is almost unanswerable!

I would suggest to you that the answers that you would get back would be unusable because it involves making too many assumptions on the part of the person who is making the response.

MR. FRASE: Well, the circumstances would be that the Conference Committee has agreed on this kind of photocopying provision, and this is the circumstance in which some people are going to have to get permission, one way or the other.

The question is based on the assumption -- which

may be wrong, but I think it is a fair one -- that a certain proportion of journal publishers will say, "Okay. We will let all non-profit libraries copy because it is not that important to us."

Like the American Bar Association, they may have a large membership, and it is not an economic matter for them.

MR. LACY: Couldn't that question be phrased, "Are you willing", instead of "Would you be willing?"

MR. FRASE: Yes.

MR. LACY: Would you feel comfortable with that?

MR. WEDGEWORTH: No!

The point I am posing is -- what I am really trying to get you to see is: What is the answer that you are looking for? Then you back up and pose the question, because I can say that different people making different kinds of assumptions could give you so many different answers that you don't come up with anything that is useful in the end.

MR. LACY: I don't know what the assumptions are. You are saying, "Are you willing?"

MR. WEDGEWORTH: What is the significance? What is the significance of an answer if I say, "Yes."

MR. LACY: That means that you are willing to authorize non-profit libraries to copy.

MR. WEDGEWORTH: Not necessarily!

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MR. PERLE: What if you say, "No"? It may be that you are not willing to show that little thing in your magazine.

It is a multiple question.

It is a terrible question!

MR. WEDGEWORTH: That is all I am saying.

MR. PERLE: Legally, it is an objectionable question. You could not ask that question over objection in Court. There are too many aspects all the way through.

I am not a statistician or an economist. I am a market tester in our business, and I know the way we market-test. We market test with the shortest possible questions in the most unambiguous way that can elicit the shortest possible and most definite response.

I, as a layman, look at this and I say, "Cripes! I would not answer this! It raises too many questions for me".

As a layman, I say that.

I asked you what response you were going to get. If you get a 10% response on this, I think it is miraculous!

I think we have to get the data. I think this is not adequate -- it is not the data that we want.

The data that we want really relates to punchy little questions.

"Overall, are you willing to license?

"If so, will you do A?

"Will you do B?

"Will you do C?

"Would you include this?

"Would you include that?"

And so on. Any question that is as long as these are, cannot get answered. (Referring to questionnaire)

MR. LEVINE: Let me ask, then: You are not opposed to what we are attempting to do?

MR. PERLE: We are charged with this. We have to do it!

MR. LEVINE: It is a question of going back to the drawing board and making the questions punchier.

MR. PERLE: With all due respect, I think we ought to contract this out -- the whole job, including the expertise in the drafting of the questions to elicit the data that we are looking for -- not the answers, but the data.

MR. WEDGEWORTH:--But which presupposes that we develop a precise statement of what it is we are looking for.

That is what I think is missing--more than anything else.

Now, there is no doubt that this data needs to be elicited. I think that Bob knows very well the frame-work within which he wants this questionnaire to operate.

MR. FRASE: One of the problems is, Bob, preparing a supporting explanation at this moment.

We cannot say now, "This is what the Conference Committee has decided, so these are the types of people who are going to pay and these are the circumstances."

I think it won't be done until then, but if we can have that as a background -- have this concrete fact -- then the whole thing would be clear to everybody--and the explanation can be a lot clearer.

JUDGE FULD: Why not postpone it until you have that background?

VICE-CHAIRMAN NIMMER: You can know, can you not--fairly well--that there will be a certain limited type of reproduction that libraries may engage in without paying. Beyond that, they will have to pay.

MR. FRASE: Beyond that, the whole prospect is all for a "profit" world!

VICE-CHAIRMAN NIMMER: That is right.

MR. WEDGEWORTH: But that is a perjurious question. I think the issue is that you want it to be precise as to what users can do--and what they cannot do.

VICE-CHAIRMAN NIMMER: Why is that necessary for publishers' purposes? Does the publisher have to know in advance--before he says he will license--which uses are

permissible without a license?

MR. WEDGEWORTH: No. No. For the publishers, it will apply as well. This is the information that I thought we were eliciting; that we can foresee down the line that it will be very clear as to how these types of works are made available.

What I was objecting to is your stating it in terms of: "We know that libraries are going to have to pay for something".

Or saying, "I would like to see it looked at from the point of ..... because I don't have to pay if I don't want it."

VICE CHAIRMAN NIMMER: We also know that publishers are going to have to permit their work to be reproduced in given circumstances.

MR. FRASE: Yes.

VICE CHAIRMAN NIMMER: But we are just focussing on an area where payment will be required, if reproduction is desired. We want to clarify that. I don't think we would have to have that in an exact line--where the one starts and the other one stops--to make these questions now, or even for the publishers to answer them now.

MR. WEDGEWORTH: I don't think this is a terribly complex problem, and I don't want to try to make it so. I think it can be done very quickly, and it should

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not cost a fortune to do it. And I would suggest that we do try to work with these people, or someone else.

Frankly, I would be very suspicious of any researcher who wrote back and said, "I find this questionnaire exceptional in its present form", because, based on their previous work there was a lot of very useful data produced by that study; but it was in a stack like this, and if you had a year to go through it, you might find it.

MR. LACY: In that connection, by the way, have we data--or have we a research project in mind--to determine just what copying of copyrighted works is now taking place; and can we make a judgement about a licensing system?

MR. FRASE: Yes. That is another important ingredient that is involved in the next project, the Minitex project.

MR. PERLE: Is someone doing that project now?

MR. FRASE: Well, there is a project which came out of a recommendation of the upstairs/downstairs group, which was advertised for bids by the National Commission on Libraries and Information Science, which had two aspects:

One was to do a sample study of a month or two months -- a sample of three types of libraries -- public, special and academic -- on the nature and extent of photocopying for inter-library loans.

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The contract was let to Market Facts, which is a big commercial firm which has done a lot of work in the library field. Mr. Palmer, who was one of the principals in the study, is here.

This Minitext Study --

JUDGE FULD: Let's finish with the first one.

Finish with the university.

Let's decide whether the Commission wants to go through with it.

VICE CHAIRMAN NIMMER: May I throw in an additiona approach at this, or an additional question, or a series of questions which were suggested by something that Mr. Hersey said this morning:

Mainly: possibly drawing this line of distinction, that we talked about, between scientific journals and non-scientific journals. Another line of possible distinction is whether the contributing authors are paid. Now, I am not sure that we would want to recommend that, obviously, but it is something that I think is relevant--and something we ought to know about.

So, could there be a question or questions going to that issue, with respect to each publisher, whether or not the publisher, or someone, pays the contributing authors, or whether they can submit it without them.

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JUDGE FULD: May I ask you: Is it desirable that we reconsider the form of the questionnaire and redirect it?

MR. FRASE: I think I would concur with Bob Wedgeworth's suggestion that we get further input. I would be willing to see the contractor make the pretest. Engage people, or, if anybody else on the Commission wants to make suggestions as to the questions, fine! The thing really cannot be frozen -- put under way in any event -- until we have the basis of the Conference Report. The factual situation, I think, is important here in various ways, including the fact that this will make the thing real to publishers of journals. They have been hearing about Copyright Revision for a long time. They said it would give them some incentive to respond.

MR. PERLE: Why is the Conference Report relevant here? We have a Statutory charge, and that has nothing to do with S.22.

MR. LEVINE: It goes to the question you asked, Gabe, of the number of responses we would get.

MR. PERLE: Political?

MR. LEVINE: That is right. People would be more willing and ready to answer these questions after Congress has made known the direction it is going to go on library photocopying.

JUDGE FULD: It is desirable that this be done this year, with the budget that we have, and that we get a response from the Commission before that period ends.

Can you not re-do it in line with what you have said, and circulate it amongst the Commissioners?

MR. FRASE: Yes. We can go beyond June 30th.

MR. WEDGEWORTH: I would like to move that we endorse, in principle, the idea of the study on soliciting information from journal publishers with the understanding that the staff, in conjunction with the Commissioners, will review the instrument and expand the authority that will be given to the principal investigators.

JUDGE FULD: You heard the motion. Is there a second?

MS. WILCOX: Second.

JUDGE FULD: Do you have a question, Ms. Karpatkin?

MS. KARPATKIN: Yes. It may seem like a small point--but I don't know. I think the responsibility for developing excellent questions in this survey should not be passed on to the Commission. I think that, while it is quite nice that we have some resident expertise on this Commission over there, that the responsibility for improving the questions to the point where they are regarded as very good questions is the Staff's responsibility and, if the necessary expertise is not on the Staff, then it is

certainly purchasable. It is a very highly developed field -- asking questions for a survey -- and I think we can have those questions readily converted into the kinds that were being discussed without putting that burden on Mr. Perle or Mr. Wedgeworth, or anyone else.

MR. FRASE: I would not object to that, at all.

Actually, I would prefer that you got that outside but, if the Staff wants to do that, that is all right with me.

VICE CHAIRMAN NIMMER: Are you speaking against the motion?

MS. KARPATKIN: Well, I was trying to refine it a little.

Yes. If I had to vote on it, I would vote against it, because I don't think that the job of developing questions for a survey should be the Commission's job. I think it is a Staff function.

MR. WEDGEWORTH: Well, I withdraw the motion, because I did not think that I had expressed that intent. I certainly am not interested in developing questionnaires for the Commission, but I also think it is our responsibility to try to set some standards for the quality of those questionnaires.

JUDGE FULD: Your motion was not that?

MR. WEDGEWORTH: That was not my intent at all!

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JUDGE FULD: I just got the recommended principle that the questions be developed and results obtained.

I don't think there would be any harm if the Staff wanted to check with one or two of the Commissioners, ex-parte, and determine whether it meets with their approval.

The motion, I think, is proper, in principle.

Can we have a vote on it, whether you agree with Mr. Wedgeworth?

MR. WEDGEWORTH: Well, since it has been seconded, let me state what I thought the problem is.

I think the problem is to obligate the funds that we have available for the study which will allow us to go forward and develop the actual study itself. This puts us on record as being in favor of doing such a study without commiting us to the details of whatever that study will be.

MR. LEVINE: We would like to officially obligate the funds, though, by September 30. And I would say--just in light of that motion--that it was not my expectation -- Bob suggested that Gabe Perle's people might look at this as the questions were prepared. I think we can do this in either of two ways that Ms. Karpatkin suggested: either getting in official question writers, or developing them ourselves. I just would like official Commission approval of what we develop before we go ahead with the contract.

And I ask whether it is the Commission's wish that this be done by the full Commission, or whether it be delegated to a subcommittee.

JUDGE FULD: The Commission agrees in principle with the formulation of a questionnaire.

Is anyone opposed to that?

(None)

JUDGE FULD: The motion is carried.

Are there any questions?

(None)

JUDGE FULD: Then I think it is up to the Staff to prepare the questions with the help, if necessary, of outside personnel.

MS. KARPATKIN: Further with respect to this, there is an undertaking on behalf of the Commission that no data of the individual publishers of journals will be made public by the Commission.

Do I take it, then, it is a legal opinion that it is immune from the Freedom of Information Act?

MR. LEVINE: I must say that I am not absolutely certain on that. I am troubled by that.

MS. KARPATKIN: Certainly, I, as a Commissioner, would not want to have the Commission make such a statement in the face of the Freedom of Information Act in particular, but some generalities, as well.

MR. LEVINE: This is a memorandum for the Commission and it may be that we will not be able to do that now. That information will be made clear to the people responding to the questionnaire, as to whether it is, in fact, "proprietary" -- not subject to the Freedom of Information Act.

MS. KARPATKIN: The government has been in the position of making this commitment to private corporations and private interests, and not being able to deliver on it! My organization has been a plaintiff in such actions. So that I hesitate to be on either side of this box.

MR. LEVINE: It is not entirely clear that the Library of Congress comes under the Freedom of Information Act.

It is further unclear as to whether we come under the Library of Congress. So there are uncertainties on uncertainties.

PARTICIPANT: Is it important that we know the identities of the people returning the questionnaire?

MR. FRASE: I don't think so!

PARTICIPANT: The question is whether it is a Chemistry journal --

MR. FRASE: Yes. We would want to identify the nature of it.

PARTICIPANT: Or what the circulation was; whether

it is a society publication, or commercial, or what.

(Simultaneous discussion)

JUDGE FULD: Time is running. Do we have another contract that is to be considered?

MR. FRASE: Yes. The second one is a tabulation of 130,000 interlibrary loan transactions by the Minnesota System, over a period of six months.

In this case you were given the table shelves of the type of information which could be derived from the basic information which is on the interlibrary loan system slips.

This is a kind of information which has never been tabulated. It tells you what the impact of photocopying is on the individual journals; over what period of time; what kind of library; or what kind of users; and there is a sufficient volume so that you can get some data which none of the other interlibrary loan studies in the past have ever yielded.

JUDGE FULD: Has the questionnaire been prepared on this, too?

MR. FRASE: It is not a question of the questionnaire because this is using an administrative document that records the facts about each one of these interlibrary loan photocopying operations.

This has taken a year's experience--tabulating

and analyzing the facts.

This information is valuable, again, for planning for the future when there will have to be some kind of a system of making an authorized photocopying arrangement work.

It ties in with the contract that Market Facts has for doing this two-part study: One a sample study of interlibrary loans, and devising a clearing house mechanism proposing various clearing house mechanisms.

It supplements their sample study, because it is not a sample. It is a universe, and it will help fill out some detail which is not available from the sample study; and that is whether the sample is biased because of the seasonality of the kind of samples that are selected.

It will help in devising various authorized systems of authorized photocopying, because it would give you some impact of the density of the business impacting on journals.

The technical contracting arrangement would be for the Commission to transfer -- for this Commission to transfer funds to the National Commission for Libraries and Information Science, which has the contract with Market Facts. They would add some money of their own, and this would be in the form of a supplement to the existing contract of Market Facts.

So far as the National Commission on Libraries is concerned, their contribution would have to be made out of the Fiscal 1975 funds which expire on June 30 and, therefore, this expeditious method of supplementing the existing contract is the only practical one of going about it.

There are present: Doug Price, the Deputy Director of the National Commission on Libraries and Information Science, and Don King, the Director of the existing project and his associate, Jean Palmer, who has done many studies, in the past, on interlibrary loans. Also, since the basic data comes from Alice Wilcox's operation of Minitex; she is also available for questions.

Doug, would you like to say a few words and then Don King -- but very few!

MR. WEDGEWORTH: Excuse me, Bob. Before we start with question on this, could I ask a question about where we go from here?

Do you contemplate doing a similar study of an operation like the ISI in Philadelphia, or University Microfilms, which would be a for-profit operation?

MR. FRASE: Yes. I have gotten some basic records from ISI already, for example, as to the volume of their copying of the most copied journals from BLLD to see what the matching up is. But I am sure they would be

they would be willing to cooperate in giving us as much parallel information as the Minnesota System has, that may be yielded from their basic records.

I also have an inquiry in to John Humphrey of the New York State System, where they have certain information, on the computer, with respect to their interlibrary loan network transactions. Since it is on the computer, to the extent it gives us anything like this rich variety of data that is available from Minitex, we would have a parallel, there.

MS. WILCOX: I would like to state, for the record, that this does pose some very real problems for me, personally. One is conflict of interest but, secondly -- or the possible conflict of interest -- but secondly, that, basically, the fundamental belief is that the borrowing library should be the library responsible for maintaining records -- not the lending library. It is simply that we have a tremendous body of data that is available, and I would not want to be in a position of saying that it could not be available. At the same time, it is awkward to be sitting on the Commission, and not having it used.

MR. FRASE: Doug Price?

MR. PRICE: Well, I believe that everybody on the Commission is familiar with the history of the study that NCLIS is doing.

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We have let the contract for that basic study, and we have some modifications which are in process, right now, which came out as a result of suggestions made in the proposal by the contractor.

At the same time, Bob approached us, and we do have recognized shortcomings in this study.

The fine grain of the distribution curves, particularly in the area between the stuff that is obviously heavily used, and the stuff that obviously is very rarely used; that the slope part, with the small size sample that we can afford to take and pay for, would be very fuzzy.

The same thing is true with the distribution with respect to time.

The more recent stuff--the heavily used stuff--would be at peaks, but the slope of that peak would be fuzzy.

Finally, we have asked for annualization. That is what we need for the clearing house, or the royalty payment mechanism -- feasibility examination. We need to know what annual volumes are, and with the very major seasonality of libraries and differences in these, by types -- the academic libraries have different seasons from public libraries, who have different seasons from special libraries, and so forth. -- so we were a little

bit uncertain of this, when Bob approached us with Minitext data being available. We can take a year's data and, with the analysis available -- if we then take, as the year, a year which includes the two periods where we are taking our samples -- then we can adjust and come up with an annualization fee which would be much more precise than anything we can come up with otherwise.

As I say, we are very interested in this, too. We are willing to make a contribution to the limit of our resources .

For your purposes, the information is tremendously valuable, I think, in comparison with what you can get from other sources. It will provide you with a lot of information which is very, very useful and at a very modest cost, I think--all things considered.

JUDGE FULD: Bob, does this take into account John Hersey's question?

MR. HERSEY: The question was whether this is a study which will satisfy our need for data in the whole universe of lending and photocopying.

MR. FRASE: Well, this is a State system that is not limited to any particular kind of material. It covers any kind of material: books, journals, periodicals of all types. It will give you a snapshot of a year.

MR. HERSEY: I understand that.

What I wondered was whether we had in contemplation any other studies that may supplement this, and give us the entire range of data. We need to determine that.

MR. FRASE: I had an inquiry into the New York State System to see what they have on this, and we can run off and analyze what they do have. I don't think they have as much detail as this. There are other State systems that we can explore. There is the ISI -- a commercial operation -- but that is all scientific, technical, and professional--on 5,000 journals.

We will try to piece together wherever there is some information which will feed into the picture -- which won't cost a million dollars.

MR. LACY: Isn't the real relevance the tying of this to the NCL?

MR. FRASE: That is right.

MR. LACY: To the last study, because it gives you a detailed study of one particular State for one year, which will enable you to project better from it?

MR. FRASE: That is right. It makes their study much more "providable".

MR. LEVINE: It is my understanding -- and correct me if I am wrong -- that the type of data that is available in Minitext really does not exist in that volume, or in the form in which it can be used in other systems?

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MS. WILCOX: As far as I know, I don't know anybody else that has been so meticulous about keeping records!

(Laughter)

MR. FRASE: Don King?

MR. KING: There are two points that I think are to be made here.

One point is that we are tying these data together with the National Probability Sample that we are doing with the libraries; and that we are using these data to calibrate those data in a statistical sense. It is a very, very useful tool.

The second thing is that I don't know of any source where one can get sufficiently detailed data to be able to get the distributions of usage, and it is a gold mine from that standpoint. It is really very, very useful.

MR. DIX: Mr. Chairman, there is a document here called: Questions relating to the Coding of the Minitext Request Slips. On page two of that, there are several things posed in the form of questions. I simply would like to suggest that those be examined rather carefully. For example, it says: "Language. Probably worth coding in order to determine the amount of foreign language material requested."

I think this is a relevant factor, for example, and I think it ought to be included.

Down in the next category, the question is whether it is worth coding for commercial publishers, society publishers, or university publishers, and so on.

My answer would be "Yes". I think it is worth spending some money on that because the data is there. It is a question of pulling it in.

It would be very useful.

And then, down further, the date. I think that is important because I think there is some indication whether the material is still under copyright or not.

MR. FRASE: The date on books?

MR. DIX: The date on general issues, too.

MR. FRASE: That is in there.

MR. DIX: It is in there, but will it be coded?

MR. FRASE: It is in the table shelves.

MR. DIX: Yes.

MR. FRASE: This question was written up for my own thinking, before I prepared the table.

MR. DIX: Finally, I would like to see the question, that John Hersey has been raising today, smoked out, to some extent, to prove this. because I personally believe this is a kind of a dead horse you have been beating, John, and this might tell us.

For example: How much of this material is what you would consider literary material -- or whatever

categories you want. Now, this could be determined by the title of the journal. The title is here. It could be coded in, and one could find out, more or less once and for all, exactly what is being borrowed.

I think this would be useful.

MR. FRASE: That is the only way it could be done.

VICE CHAIRMAN NIMMER: May I add just a small footnote? When you say "once and for all", one of the things that bothers me about this study is that it is going to tell us as of this moment in time what the practices are. Nothing more than that.

JUDGE FULD: Is the Commission ready to indicate acquiescence in this project?

MR. PERLE: What are we voting on?

MS. KARPATKIN: Aren't we going to respond to Ms. Wilcox's comment?

MR. LEVINE: As to conflict of interest?

MS. KARPATKIN: Yes.

JUDGE FULD: Your organization is not paid, is it, Ms. Wilcox?

MS. WILCOX: No.

JUDGE FULD: You are not paid.

MS. WILCOX: No.

JUDGE FULD: Offhand, my reaction is that there is

no conflict.

MS. WILCOX: Well, I think this is something that the Commission has to at least address itself to.

MR. FRASE: Free use of her records?-- we are paying for the coding, the key punching, the computer program that turns out analytical tables.

MR. LEVINE: That is really why I asked the question, too, about whether this material exists elsewhere. This is really, as far as we know, the best source for this material. So we are not going to Minitext to do this project because Ms. Wilcox is on the Commission. We are going there because that is where the information of data is secured.

MR. PERLE: I would like to move that the Commission approve a study such as this in connection with NCLIS.

That is the end of my motion.

I am not, by that motion, approving or disapproving any of the materials that have been furnished to us.

I think that that is something entirely different. I want to save that for the Executive Session.

That is my motion.

JUDGE FULD: Is there a second?

MR. LACY: Second.

JUDGE FULD: Is anyone opposed to the motion,

based on principle?

(No response)

JUDGE FULD: Do you want to discuss it?

VICE-CHAIRMAN NIMMER: Mr. Chairman, assuming that that is passed, I think Alice deserves a further word, perhaps. I want to say for myself that, even if we did not already have an opinion from the highest Judge of the highest Court in the United States saying that it is all right, I certainly don't see any ground for not agreeing. I think we all agree.

MR. PERLE: That is a footnote to the opinion!

MR. LEVINE: That is the second opinion that Judge Fuld has written!

JUDGE FULD: Well, the Commission has higher jurisdiction than the Court of Appeals!

We will take the project up in Executive Session.

That brings us to the last item on the agenda.

Are the parties here?

EDUCATIONAL COMMUNITY PRESENTATIONS ON SOFTWARE PROTECTION

JUDGE FULD: You are going to enlighten us on Educational Community Presentations on Software Protection.

MR. STEINHILBER: I am August Steinhilber, Assistant Executive Director of the National School Board Association.

However, I am here today as Vice Chairma

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of the ad hoc committee, which is the Educational group coalition looking at copyright revision in the copyright law.

The ad hoc committee has been in existence -- I am not quite sure how many years, but I am sure it is at least twelve.

With me is Dr. Anna L. Hyer from the National Education Association. Dr. Hyer has submitted a statement to the Commission which, by and large, is the position of the ad hoc committee.

I would indicate to you, though, that there are some differences of opinion within the educational community and that is one of the reasons we were waiting for Dr. Hilton -- the fact that he does have a somewhat different position and, as in many industries, there is not unanimity of opinion in all aspects.

MR. CARY: Excuse me. What is Dr. Hilton's position?

MR. STEINHILBER: I will get to that when we, basically, talk to him, because I think I can give you a brief summation of where our differences are.

MR. CARY: I meant, what is his title?

MR. STEINHILBER: Oh, I am sorry. That is a good question!

When we get outside of our own organization and you

ask for the title of someone outside of our own particular organization, I am not quite sure.

I gather he is from the University of Michigan -- representing the higher education group.

Shelley Steinbeck of the American Council of Education is the Chairman of the ad hoc committee. Unfortunately, he was unable to be here at this time.

I think the best way to describe it is that we are, basically, advocates, and I think we ought to explain our advocacy role, and where we have been up to this point in time, Some of you here have heard us before. To those of you who have, I am sorry if I am somewhat boring you with this discussion.

In the past, our position, philosophically, has started off with a somewhat different point of view than normal, in that we started out with the philosophy that copyright is not necessarily a proprietary right in and of itself; that that is not the sole purpose of copyright protection.

When we take a look at the Constitutional provision on copyright, it has other bases--outside of the property right.

We look at it in terms of scholarly dissemination of information; a clash of ideas, if you will, to discuss how our civilization can better itself through this

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clash of ideas.

Therefore, we invariably have -- either before the Commission, or before the Copyright Office, or before Congressional Committees -- pushed for an educational exemption, and we have fought hard for an educational exemption; and that we have pushed almost to the point of not discussing "fair use".

There is a very subtle difference -- but it is a very important difference to us -- between the discussion of an exemption, and fair use.

The basic difference is that, in fair use, you are assuming that infringement has taken place, but that there is a defense to that infringement action.

What we are saying is that in the scholarly aspects of the copyright law, the exemption takes it out of even being discussed as an intringement in the first instance.

If there is a position that we support -- that is, exemption over fair use -- I would say that in the compromise which I am sure you have seen -- if not, I will submit one for the record. It is a compromise that we reached with the Authors League and the Association of American Publishers dated March 19, which was sent to the Honorable Robert Kastenmeier.

We did reach a compromise on what could be

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copied -- what we would both agree to in terms of both language in law, and in report language on copyright.

But one of the items about which we fight most vigorously, even beyond this discussion between exemption and fair use, is compulsory licensing.

Lest you get the wrong impression, we will continue our discussion on compulsory licensing because compulsory licensing takes us even one step further beyond fair use. It, in effect, destroys both exemption and fair use by its very nature, because the whole idea is to begin a licensing practice so that there would be no longer a need for fair use.

Of course, the exemption would have been lost in a discussion of fair use in the first instance.

Now, I indicated to you that there is a slight difference of opinion by a gentleman who will be coming here. If he does not arrive, I will, briefly, explain: the difference of opinion is with respect to computer programming: whether or not it is so different that it is more like the public broadcasting concept of licensing -- and it is more likened to that, than it is likened to our question with respect to copying of books and materials and things of that sort.

VICE-CHAIRMAN NIMMER: May I interrupt just before you get too far afield on your basic concept of

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exemption, because it is educational. Do you apply that to text books? That is, not xeroxing or photocopying of text books but simply one text book publisher wants to copy a print -- copy a text book in which the copyright is owned by another text book publisher, but he says, "I am doing it for an educational purpose"?

MR. STEINHILBER: No. This is specific. It is not-for-profit exemption for scholarly uses.

VICE-CHAIRMAN NIMMER: Suppose it is a University Press, but it is a non-profit press. Would that be all right?

MR. STEINHILBER: No. We are getting into the subtle differences between that. That is why I was, sort of, shortcut into the document that we submitted.

VICE-CHAIRMAN NIMMER: I am questioning your philosophic approach to it/because it is educational, it is therefore exempt.

MR. STEINHILBER: There are, obviously, limitations. If we want to start discussing limitations: we obviously make limitations with respect to work books which are consumed upon usage, which would destroy the market in and of itself. There are exemptions even with that.

I wanted to start off with a philosophical position which, itself, has limitations.

The field of law is not a precise science -- at least of this time and place.

I think the last kind of question that we have without going into our presentation here -- which we have submitted for the record and I will let Dr. Hyer discuss that -- is that a further concern relates to computer usage, and the inclusion of copyright in the whole area of computer programming. That question is: Are we now moving even a further step down proprietary rights, to the point that data itself becomes copyrightable? Not the presentation, but the data itself -- which is far afield from where copyright started out. But, nevertheless, as we talk about the program, how entwined is the program with the data; the difference between what the instructions to the machine are, and the data that is in the machine, so that we now are moving ourselves to the point that information -- raw information -- becomes subject to copyright.

There, I think, we would all have problems with respect to the method in which information is kept, distributed, and its accessability, if it were subject to copyright law in and of itself.

Those are some basic philosophical positions, that I think we wanted to make sure the Commission is aware of.

With that, I will turn it over to Dr. Hyer, to

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to go into specifics.

DR. HYER: As my colleague said, the National Educational Association has been a member from the very beginning -- I believe it was probably instrumental in organizing the ad hoc committee and, for many, many years, one of my colleagues at the National Education Association served as Chairman of it. So that we have been very supportive. We have been a party to developing the cooperative input -- what is it -- 30, almost 40, organizations that are members of that committee. They are the positions, and they are very well thought out and hammered out within the educational community.

The paper that we submitted today deals only with some positions speaking for the NEA itself, and not -- although they are in keeping with the ad hoc committee's position -- about the computer program and the copyrighting of these.

I am not going to read the paper that you have in your hand. We have addressed ourselves to the questions -- those are the nine on which we felt we had any expertise and we have related those in the paper.

I might say we have no objection to the copyrighting of computer programs, although there is a little bit of concern about the copyrightability of them--in case it does lead to any special claims for secrecy or any

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special, unique protection that would be required in order to satisfy the people that are marketing these.

If that were the case, then I think that we would think that, probably, they ought to move to some other mode of protection, rather than the copyright. But, as far as we know at the present time, we have no objection to the copyrighting of computer programs.

We do feel that they ought to be treated like other copyrighted materials; and I think we are strongly opposed to the copyright as it would apply to the input into a computer. I think this is because we liken it sometimes--to make it as simple as possible--to the purchasing of a book, and then the reading of the book. The reading of it -- the thing that you have purchased -- you are not interfering with the copyright when you do that. It is only when you start copying from it, again, after you have done your reading. It is the output that is in question -- how you use the output from it--rather than the input. And that, I think, will be clearer to you as you read the paper than, perhaps, in the way I am trying to state it very quickly.

We would oppose, as I said, any additional protections for the software for the computer. If we feel that they cannot be handled under the usual use of copy-

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right protection. Then, I certainly think, we would have some question about adding any special protections for software for computers.

I might add that presently in Education, the main uses, I would say, were first, in Educational Administration -- wouldn't you agree? -- with the data that is financial; with the records -- things of this sort. That is the major use.

The second major use, I think, is in the field of Research. Would you agree with that?

And, lastly, is the use of computer programs for teaching. That is not as developed for use in education as are these other two fields. So we do have quite an interest in data itself, as not being copyrighted -- but merely the conditions under which it is stored.

I think, in summary, I just might say that we believe that a computer program should not be handled differently from other copyrightable works. If that result does not provide the industry with the protection that it thinks is necessary, then we think that they should seek protection in some other way than the copyright field.

We think that input should not be subject to copyright restrictions; output would be handled as would any other copyrightable work.

I think that, probably, summarizes the points that

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are made in the paper that was submitted.

MR. STEINHILBER: I would like to make just two minor comments: one of which being that I think one of our other concerns is the fact that, in any discussion on the use of computers -- especially in Education -- we, too, are concerned about the future, and whether or not copyright law will lock us in, or restrict the educational endeavors of how the computer can be used in educational instruction.

I think, just as the copyright industry was -- no question -- badly damaged by the 1909 law, and what was happened since then, and how technology hurt, I would say, in the publishing industry -- we would have no question about that -- we have somewhat similar kinds of concerns that the pendulum might swing the other way so that, if there were any change in philosophy to basically restrict the education of children to the traditional three-hour method, it would restrict us from moving to anything different.

One final comment, just to show the solidarity here: I would just point out for the record that only on rare occasions does the NEA and the School Association agree. When Management and Labor does agree on certain things, I would like to point it out for you on the record.

JUDGE FULD: Thank you for being here.

VICE-CHAIRMAN NIMMER: As to your distinction

between input and output, I can understand that with respect to copyright data -- material data -- that is fed into a computer, and then you want to feed that out; but, if I understand a computer program -- and I am not certain that I do -- a computer program constitutes instructions to the computer. You don't have an output of the program per se -- at least generally you don't, I don't think.

DR. HYER: If you buy the computer program, the only way you can read it is to put it in the computer.

VICE CHAIRMAN NIMMER: The question should be as to the words "read" or "perform". If you call it "perform" it is an infringement; if you call it "read" it is not an infringement.

MR. LACY: I wonder about the analogy to a film where there exists some distinct right to make a copy of the film, and the right to perform with that film.

If a school buys a film, there is a license -- either expressed, or tacit and implied -- in the purchase of it, that the school can show the film in the school. There is no point in buying it if there was not.

Similarly, when you buy a program from I.B.M. to use in a computer, there is no point in buying it if you do not have a computer.

It does not mean that you have a total right, once you buy the film. One cannot lend it to a friend who

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runs a commercial local TV station and have it performed on the TV station for profit.

MR. STEINHILBER: That would not even give us the right, if I were the attorney for School District A, to turn that same program over to School District F, to use carte blanche.

MR. LACY: I am saying there is a right about inputting the computer to that program itself. It is not an unlimited use gained by the buyer.

DR. HYER: That is why the user of the "output" is a different matter. I was trying to make a distinction between the original input, and the use after that original input.

MR. LACY: I really do think we are sliding over -- we are really thinking about data bases, not program.

Normally, one can, of course, duplicate a program on a computer.

JUDGE FULD: If there are no more questions, thank you.

MR. LACY: We have not heard Dr. Hilton's position.

MR. STEINHILBER: Basically, his contention is that he makes a distinction between the program and the data, and he contends that, as to the program itself, the program should be subject to a compulsory licensing

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provision. But not the data.

MR. LACY: Are you sufficiently familiar with his position, let us say, to assume that it means compulsory to a university?

If a university has the job of working out a curriculum assignment situation, or maybe just wants a payroll or an inventory accounting system, and it can shop around and discover a program that some commercial firm has, it can compulsorarily take possession of that and use it on the basis of some government stipulated program?

Is that it?

MR. STEINHILBER: That is correct. The program, itself, could not be kept completely secret. There would be some sort of absolute access.

JUDGE FULD: Thank you.

We will adjourn the public hearing and go into Executive Session.

(Whereupon, at 4:45 o'clock, p.m., the public hearing was adjourned until 9:30 o'clock, a.m., June 10, 1976.)

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Part II

WAMiller

NATIONAL COMMISSION ON NEW TECHNOLOGICAL USES
OF COPYRIGHTED WORKS

(CONTU)

Seventh Meeting

June 10, 1976

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Room 910
CONTU Conference Room
1921 Jefferson Davis Highway
Arlington, Virginia

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BEFORE:

STANLEY H. FULD - CHAIRMAN
Retired Chief Judge,
New York Court of Appeals
Special Counsel, Kaye, Scholer,
Fierman, Hays and Handler

MELVILLE B. NIMMER -- VICE CHAIRMAN
Professor of Law
UCLA Law School

APPEARANCES:

(As hereinbefore listed)

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JUDGE FULD: May I call this meeting to order?

I welcome Quincy Rogers, the Executive Director of the Domestic Council on the Right to Privacy.

You are going to discuss the National Information Policies.

STATEMENT OF QUINCY ROGERS, EXECUTIVE DIRECTOR
DOMESTIC COUNCIL ON THE RIGHT TO PRIVACY

MR. ROGERS: Thank you very much.

JUDGE FULD: Thank you for being here.

MR. ROGERS: I thought, before I got into anything, I would tell everyone a little bit about what the Domestic Council on the Right to Privacy is about, and what its history is, briefly.

The Committee was established in February of 1974 and from, time to time, there are special committees of the Domestic Council established.

The Domestic Council, of course, is the Presidential staff arm which is responsible for domestic policy and which, in a sense, parallels the National Security Council and the Economic Council.

As I said, from time to time, in special areas there are established committees of the Domestic Council which I tend to think of as subcommittees; but they are not so named.

The Committee on the Right to Privacy is one such committee. It is chaired by the Vice President and

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is made up of those Members of the Cabinet and other Agency heads who have a particular interest in the Privacy Policy.

The first Executive Director Phillip Buchan, en. sp. and Douglas Metzler is also now on the Economic White House Staff. He was the Interim Acting Director for quite a period of time.

The Committee has been active in a whole variety of Privacy questions over the last couple of years, including the passage and later implementation of the Privacy Act of 1974. We are at work now on, for instance, bank records legislation, which was before the Congress; work on Security Clearance matters; and quite a number of other initiatives that the Committee has been involved in.

Of course, that is not why I am here today. I am here today to tell you all a little bit about something else that we have been working on, and that is what we are calling an "Information Policy Study". Let me give you a little bit of the background on that.

Vice President Rockefeller was concerned that, in addition to the Privacy questions, that this part of the policy-making apparatus was to try and take a look at some of the broader questions, and information policy. So we began to get into questions of related areas quite a bit; and if I might just make reference to a few notes

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here -- which I think will explain a little bit better some of that background, and will also give you some idea of the kinds of things in which we have become interested.

We have said, on various occasions, that privacy is a cutting edge of a host of information policy issues, and that the privacy issue has brought a realization of underlying structural changes in society. This kind of structural change has been commented on by Daniel Bell; by Peter Drucker and other people who have indicated that we are in the midst of it; and that the underlying meaning of this structural change is that ours is a post-industrial society in which the service sector has outgrown the goods-producing sector.

Bell and others have noted that the portion of the service sector which predominates is the one which deals with information. He has called this the "Information Age."

In a memorandum to the Vice President, we noted that it was both a sign of growing interest in, and policy fragmentation of, issues of this nature; that there are currentl at least ten temporary study commissions in various states of existence, dealing with various types of information issues.

Among the better known of these commissions, of course, is yours. There is also a Privacy Protection Study Commission.

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There is a Federal Paperwork Commission; there is an Electronic Funds Transfer Commission; and there are a number of others.

In October of last year, the Domestic Council Committee held what we call a Roundtable on Privacy and Information Policy, and there were a number of knowledgeable people who were invited to discuss a broad range of issues.

The two days which were available were not nearly adequate to deal with all of the issues pertinent to such a topic, but did get a process of such discussion which culminated in the President requesting the Committee to review major information policy issues and report back to him -- the deadline being September 1 -- with recommendations from the government organizations to deal with them. In so doing, he noted the need for better coordination of government policy in these areas.

JUDGE FULD: Is there a conflict between your organization, and other governmental organizations, on areas that invade privacy?

MR. ROGERS: No. I would not say so. Perhaps, though, it will become clear as to what I am talking about as I move on.

There are other major issues about which we are speaking. I should say there are as many lists as there

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are people and organizations, who have an interest in, or a perspective, on what they call an "Information Policy".

It seems to me that the government's list must--necessarily--give priority to those issues which have major impact on society and the quality of life. And, as I tell everyone, if I don't know the issues which they think are crucial, I would hope that they would give me the benefit of their views.

We on the Committee Staff, have begun by dividing the relevant issues into several categories. The first of these are economic issues.

Questions such as: What is the significance of the fact that some conservative estimates indicate that 30% of our Gross National Product is in the Information Sector, and that over 50% of our labor force is now involved in these activities?

How adequate are our tools for measuring these phenomena?

What are the labor-related issues that arise from these trends?

What inflationary or deflationary significance do they have?

What are the implications of this activity for growth policies and conservation-of-resource policies?

What are the pertinent microeconomic questions,

such as increasing corsumer-group demands for information?

The second set of questions:

What is the proper locus of regulation of the information sector, for security, confidentiality, accuracy, etc.?

What are the implications for Federal-State relations of calls for preemption by Federal law?

Are other methods available to harmonize potential conflicting laws of different jurisdictions?

What may happen internationally, where harmonization of regulation is even more difficult?

Can we prevent the erection of data walls and other restrictions on free-flow of information?

Third: What are the means of harmonizing the conflicting impulses represented by the Freedom of Information Act and Sunshine Laws on the one hand, and Privacy and secrecy laws on the other?

How are these lines to be drawn?

What are the considerations which apply only to the public sector? To the private sector?

Fourth: How should we, as a nation, cope with communications networking of all types?

How should we cope with the fact that the different systems for the transmission of information are being driven, by technology, into similar modes?

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What should the infrastructure of our information systems look like?

How can we preserve competition?

How can we preserve private initiatives?

Fifth: How can we best provide incentives for the creation of knowledge?

What is the role of copyright, patent, trade secret in this process?

How should our national knowledge base be managed?

What is the role of government, vis-a-vis the private sector, with respect to the enormous amount of knowledge and information created by government?

Tony Oettinger, of the Harvard program on Information and Information Technologies, has said that, "Everything is related to everything else."

This truism is evident in any categorization of information policy issues such as I have just outlined. Networking issues impact on economic policy questions; freedom of information, and compensation for information questions interrelate; etc. But the divisions that I have just outlined are a place to start fulfilling our mandate.

Having outlined some of the areas which-- it seemed to us--that any such categorization of important issues facing government should have, I will come back to

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what I listed as "Category 5", which is, I presume, the thing that is of most interest to this Commission; and that is the question of technology, copyright, and so on.

I have, incidentally, read the questions which you have sent out, and I am not going to presume to answer them--for a variety of different reasons.

The first, of course, is the fact that I do not consider myself an expert in copyright. I think that more or less explains the crux of what it is we think we are about--as opposed to what we think you are about.

The question that I am addressing, primarily, is less one of what the substantive rules ought to be at this juncture, than one which concerns how government policy making apparatus ought to be organized.

At the current time, in the Executive Branch, questions relating to all of these areas -- many of which we believe interrelate, and many of which many people are beginning to see interrelate to a much greater sense -- are scattered throughout and, indeed, with respect to some of the issues that I talked about, the Executive Branch has no capability.

So the problem, as we see it, is a policy machinery. I could put it in a more practical way, in a sense, by saying that there has been a great criticism lately that Commission reports have a tendency to be

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sent back to the government very frequently, and are sitting on shelves and gathering dust some place.

This is not the way things should work.

One of the things that I am concerned with is whether or not there will be continuing apparatus to continue to deal with, not only the questions which are being faced now and dealt with, but those questions which have not been anticipated and will, eventually, arise.

So, again, the question, in a sense, is: What is the policy - making machinery of the government going to look like? Who is going to be left, over the years?

The other major underlying theme, I think, of the effort that I am involved in, is sort of a question of viewing policy questions in relationship to each other.

In the case of Privacy and Freedom of Information, I think it is probably fair to say that those were handled more or less on an ad hoc and separate basis as they went through the Congress within the Executive Branch -- this being one example of the fact that/things start getting overly compartmentalized, it gets very difficult to have any adequate coordination.

I brought a couple of things -- particularly for Professor Miller, who is not here today -- which I thought were a good example -- at least, I judged they were an example of over-compartmentalization in an organization

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which is not government but which, I suppose, has its own bureaucratic problems. I also brought it because I thought Professor Miller has indicated it was an example of one of the privacy issues we are going to have.

The Washington Post on June 7 -- that is last Monday -- carried an editorial which said: "Absent fathers and child support", which is an editorial all about the parents-locator service, which is a system designed to go around the country and find the fathers of children who are on Welfare and get them to pay up and fulfill their obligations.

It struck a bell with me, so I went back to the files, and I found that a little less than one year ago, the same Washington Post put out another editorial attacking that same program!

So I sort of viewed that as an over-compartmentalization question but, also, I think --

JUDGE FULD (Interposing) It might be maturity.

MR. ROGERS: Well, it could be a change in position. That is right.

But I was interested that there was no reference back -- no reference back. Indeed, if you read them, you can see it looks like they came out of two different areas.

Other than that, again, except to stress that we do not view our role as answering the kinds of questions

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raised, but as one that helps hone them.

Again, the only other thing I would add is that, in terms of the copyright -- the whole sort of copyright question -- in both terms of the Hill, and in terms of the work you are doing; in terms of its relationship to changes in users as well as owners, I think that one of the things which I would hope we could all do in some sense is to advance the sense of understanding of the interests that are involved.

I say that because, from my limited experience in these areas, I have a sense that, too often, the important public interests that are involved in these questions are not as clear as they seem, because of the focus that one begins to have in terms of all of the various private interests that are involved.

I say that from sort of a personal point of view, having been on the Hill at a time when the legislation was going through. I worked on the Senate Judiciary Committee.

In my view, Copyright is an example of the very important kinds of rules which govern the whole set of issues relating to the knowledge base and the dissemination of knowledge, and that really is about all I have to say-- except that I would be glad to answer any questions that anybody has.

MR. PERLE: You have suffered through Copyright for a long time. I am very familiar with it.

Is there anything that we, as a Commission, should be considering in the Privacy area in relation to our Statutory charge?

MR. ROGERS: I am sorry. I really don't have anything specific at the moment.

MR. PERLE: Let me sharpen the question a little.

We are really asked to deal with provisions of copyright legislation.

MR. ROGERS: Yes.

MR. PERLE: Does the Privacy consideration belong there, or in some other type of legislation?

MR. ROGERS: Well, the Privacy consideration, I think, probably belongs in other types of legislation.

There has been a standing debate as to whether or not privacy legislation should be dealt with in an omnibus fashion, or on a piecemeal fashion; but in neither case does it seem to me that we are talking about legislative packages.

MR. LEVINE: Along those lines, I have met once -- and it is our pleasure to continue discussing the interrelationship, if there is such, with the Executive Director on the other Privacy Commission -- the Privacy Protection ~~Detection~~ Commission. So that they understand the role of

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Copyright, and we understand what they are doing, to see if there is any interconnection.

VICE-CHAIRMAN NIMMER: May I just point out when Warren and Brandeis wrote their article, The Right of Privacy, it started in a solarium. They relied, in a large degree, upon earlier common law copyright cases, particularly one involving Prince Albert, and the privacy of certain documents of his. In origin, there is some relationship.

MR. ROGERS: Yes.

MR. DIX: Mr. Chairman, I am referring to the last thing you said about the public interest -- the latent public interest -- in all of these areas. I wondered -- we have been wrestling with how one attempts to measure two conflicting, as it were, forces, in one sense, with Copyright -- the rights of the creator and the producer, as against the rights of the consumer, or the interests of both.

I wondered, in the Domestic Council, how you go about weighing these things.

I guess what I am saying is: Have you found techniques or methods of weighing two rather disparate kinds of interest like this, and coming out with where the public interest lies. When I say "weighing", let me say one more thing:

Are there inviduals who have a special technique of doing this whose judgment one can say has a certain validity, perhaps: Policy analysts -- this sort of person?

MR. ROGERS: Well, I feel like I would be getting a little far afield to be responsive, but it seems to me that one answer is that the Constitutional system presumes that by continuing to debate and hammer out things in different forums, you somehow arrive at that.

I would almost be tempted to go so far as to say that, as a reflection of the fact that there is no simple formula. But maybe, if I can try and be a little more specific about what I had in mind there: looking at the information policy questions has taught me -- and this may be an obvious thing to many people but it caused it to occur to me -- that one has to be very careful when they look at information flow, about what the effect of the regulation in one place will mean in another place.

I have in mind, for instance, as a rough analogy, the Buckley Amendments that deal with information in schools. And on the sort of tail-end, shall we say, of information flow, the public policy now is that that shall be open to the subject so he can look at his own records. And critics of this system charge that the result of that is to simply dry up the flow at the beginning

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-- to take the right away and make it meaningless.

It seems to me -- and I grant that it is rough -- it seems to me there is sort of a rough analogy in the question of information -- whether we want to call it "knowledge" or "technical skills" or whatnot, that is sort of where a copyright /patent /trademark stands at the gate of its regulation without getting into a deep discussion about the Constitutional background of copyrights, etc. It seems to me that one policy basis that one might have for these systems is whether or not they maximize this process of dissemination of knowledge and information and, in doing that, it seems to me that you have to realize that you maximize -- there is an assumption that you maximize dissemination by providing adequate incentives. But you know, how much deeper can you go into that kind of a formula analysis? I don't know. It is one that I am particularly interested in, because it seems to me it goes to an underlying policy question that I would favor.

MR. DIX: Thank you. That is quite responsive to a very vague question, I must say.

MR. ROGERS: Thank you.

MR. CARY: Mr. Chairman?

JUDGE FULD: Yes.

MR. CARY: If I may ask a question somewhat along

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the same line.

We have been wrestling over the past meeting or two with the problem of whether there should be -- or is there -- any adequate protection for computer software, for example, and I just would like to get your comments on where you think public interest lies in a situation like that.

Here, we are confronted with such ideas as, well: Here is an industry which is burgeoning -- as some people have said -- at producing software, and they say some of them rely on -- what is the word -- "trade secrets philosophy". They really don't think it is an acceptable means of protection.

They seem to come out, in general, for copyright protection. So we are charged with the problem of deciding some sort of a recommendation in this area.

Do you have any thoughts along this line -- of whether or not protecting software, in a sense, is in the public interest; or does this tend to create a monopoly --bearing in mind, of course, that patents are monopolies and that copyright is a type of monopoly, but they have a Constitutional purpose to increase the incentive of the authors and inventors, and to thereby make it possible to disseminate this information more readily.

Do you have any comments on that?

MR. ROGERS: Well, I read--as a matter of fact, yesterday--what I think is all of the testimony that you had in your last session -- if not a good portion of it -- and it was then that I decided for sure that I was not going to get any specific answers about that sort of thing--except that it occurred to me: I recall that someone had pointed out to me that Earl Kitner in his book, Monograph on the Law of Intellectual Property, made reference to the fact that the patent copyright systems were products of the industrial age and were a response to the need for the dissemination of knowledge. It occurred to those of us who had been talking in terms of the post-industrial age--that maybe we are talking -- at least with respect to some of these things -- about entirely new systems.

Now, whether or not that is Constitutionally possible -- how one finds the authority for it -- is a different question. But it does seem to me that one ought not -- at least at the outset -- shirk from the possibility of an entirely new approach -- something that is sort of sui generis, I suppose.

MR. CARY: Thank you.

MR. ROGERS: I really don't think I ought to make any comment about the balancing because, again, I want to repeat that it seems to me that my current responsibility is to try and focus on what the policy

making apparatus of the Executive Branch ought to be, over the next few years. While I feel very strongly that there ought to be somebody at a high level who is concerned about these kinds of issues, I would not it seems to me premature -- try to substitute judgement for how one would answer those questions. Indeed, in the first instance at least, it is the responsibility of the Commission, I suppose.

MR. CARY: I did not have any intention of putting you on a hook or anything. I was speaking philosophically.

MR. ROGERS: No. I understand.

MR. CARY: I see your point of view, and I accept that.

MR. ROGERS: Thank you.

MR. LEVINE: Did I understand that by September first you would be issuing a report on the coordination --

MR. ROGERS : (Interposing) That is the deadline. I must say that I am not sure that:

(a) We are going to make it at this juncture, or

(b) It would be public at that juncture.

MR. LEVINE: What about the Privacy issue?

MR. ROGERS: Under the Freedom of Information Act--at least the recommendation portion-- until the

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President has had a chance to focus on them; although I probably will feel reasonably free to talk about it at that juncture.

JUDGE FULD: Are there any other questions?

MS. WILCOX: I wonder, in your position, if you have any advice for us in dealing with some of the issues of Privacy in the data basis -- the computer data basis -- not the software programs -- that would be a consideration for the general problem?

MR. ROGERS: Well, I guess the thing I would focus on, in those terms, would be the definitional problem. There is, of course, a sort of full question of property rights. I don't know if one wants to call those "Privacy", or not.

Then there is the whole set of confidentiality questions. I guess that would really be security/confidentiality, and that whole set of definitional questions.

One source for defining those is Ruth Davis's group out at the Bureau of Standards. It has done quite a bit of work in terms of discussion of the definitional differences, and a discussion which I think helps hone down really what it is that we are talking about. I would be glad to try and pull together some of that stuff and send it over.

JUDGE FULD: We would appreciate that.

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MR. LEVINE: I found, when we discussed the computers, that making analogies is unwise. But I will make an analogy on this. In the area of obscenity, which may be prohibited by some laws, at least the law as we understand it now is that you can, nevertheless, secure copyright for obscene material, notwithstanding the fact that there may be a law that says it is obscene. There may be privacy material and data bases that may not necessarily mean that we are not entitled to copyright protection.

JUDGE FULD: Any other questions?

(None)

JUDGE FULD: Thank you very much.

(Whereupon, at 10:45 o'clock, a.m., the public hearing was concluded.)

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